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THE CHILD LABOR TAX CASES.

Nos. 629, 630.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

D. T. BAILEY, COLLECTOR OF INTERNAL REVENUE, ETC., APPELLANT,

vs.

JOHN C. DRESSER, TRADING AND DOING BUSINESS AS VICTOR COTTON MILLS, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

D. W. BAILEY, AND J. W. BAILEY, COLLECTORS OF INTERNAL REVENUE FOR THE EASTERN DISTRICT OF NORTH CAROLINA, PLAINTIFFS IN ERROR,

vs.

DRURY MANUFACTURING COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR APPELLANT AND PLAINTIFFS IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

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APPEAL FROM AND WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF ON BEHALF OF APPELLANTS AND PLAINTIFF IN ERROR.

In each of these cases the same District Court has declared unconstitutional the excise tax imposed by Congress upon those employing child labor in mines, quarries, factories, and similar employments.

THE STATUTE.

The tax was imposed by section 1200 of the revenue act of 1918, approved February 24, 1919, 40 Stat., c. 18, p. 1138, which provides as follows:

> That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (*a*) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (*b*) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.

Succeeding sections provide the basis upon which net profits are to be calculated and contain provisions the effect of which is that the mere accidental

employment of children under the permitted age shall not make the employer liable for the tax if he has in good faith taken the required precautions to prevent such employment.

THE FACTS IN THE VIVIAN COTTON MILLS CASE.

This suit was instituted on July 7, 1921, to enjoin the collection of a tax assessed under the law in question, the contention being that the statute is unconstitutional.

The bill, as amended, alleges that the plaintiff, John George, during the year 1919 manufactured cotton yarns at Cherryville, N. C., under the name of "Vivian Cotton Mills." The property and business had passed to the other plaintiff, the Vivian Spinning Company, before the institution of this suit.

The defendants are the Collector and the Deputy Collector of Internal Revenue for North Carolina.

On November 9, 1920, the Commissioner of Internal Revenue, acting under the provisions of the Child Labor Tax Law, assessed against the plaintiff George and his property, the Vivian Spinning Company, the sum of $2,098.06, due November 19, 1920, with a penalty of 5 per cent and interest at the rate of 1 per cent per month from the date due until paid, the Commissioner claiming that during the taxable year 1919 there had been employed in the Vivian Cotton Mills children under the age of fourteen and children between fourteen and sixteen years of age more than eight hours a day, after 7 p. m. and before 6 a. m., contrary to the statute.

The plaintiffs deny violation of the Act, and aver that the Commissioner advised them to file a claim for abatement of the tax, which claim was duly filed and disallowed, and the Collector was instructed to collect the tax by distraint proceedings. They further allege that, unless restrained, the Collector will sell plaintiffs' property, subjecting plaintiffs to a loss of approximately $50,000, in view of the low state of the market for cotton mills, cotton mill stocks, and cotton mill products, and to other great and irreparable damage.

The bill prays that the assessment be declared void and that defendants be enjoined from selling plaintiffs' property, it being alleged in the bill, as amended, that the statute is unconstitutional, (1) as depriving plaintiffs of their property without due process of law, in violation of the Fifth Amendment; (2) as denying to them the right to trial by jury, which is guaranteed to them by the Seventh Amendment; (3) as providing for the exercise of a power not delegated to the United States, but reserved to the States and to the people under the Tenth Amendment; and (4) as not constituting a tax measure but an attempted regulation of hours of labor and age of employees, under which a penalty is imposed and enforcement is proposed without giving the petitioners an opportunity to be heard, although they deny liability.

A temporary restraining order was issued as prayed. Thereafter defendants filed an answer to the bill.

The good faith of the revenue authorities in assessing the tax is shown by the averment in the answer that the plaintiffs had filed with the Collector a report that during the taxable year 1919 they had employed children within the ages referred to in the statute. This good faith exists even though the plaintiffs assert that if a report of such employment was made the report was erroneous.

The defendants also moved to dismiss the case for want of jurisdiction, on the ground that the court was forbidden by Revised Statutes, section 3224, to entertain a suit to restrain the collection of a tax.

The District Judge denied the motion to dismiss and made permanent the temporary restraining order. The court held that the Child Labor Tax Law was unconstitutional, as constituting an attempt on the part of Congress, not to collect revenue, but to control the internal affairs of the States.

It further held that a suit to prevent the collection of this tax, which was held unconstitutional, might be maintained, since to permit its collection would be to extend the power of Congress, through taxation, to legislation forbidden by the Constitution, especially the Ninth and Tenth Amendments. It also ruled that the statute provided not for a tax but for a penalty to prevent violation of its provisions, which penalty could not be enforced by assessment and distraint, and that therefore a permanent injunction should be granted.

The defendants were allowed a direct appeal to this court.

THE FACTS IN THE DREXEL FURNITURE COMPANY CASE.

This is a suit to recover a tax of $6,312.79, with interest, levied under the Child Labor Tax Law and paid under protest on October 20, 1921, it being asserted that that statute is unconstitutional.

The plaintiff, the Drexel Furniture Company, is a North Carolina corporation engaged in the manufacture of furniture. It is suing J. W. Bailey personally and as Collector of Internal Revenue for the District of North Carolina. He was Collector as aforesaid when the tax was paid. After that date, but before the institution of this suit, he resigned from his position and was succeeded by one Grissom.

Prior to September 20, 1921, plaintiff was informed that during the year 1919 it had employed in its business children under the age of fourteen. It thereupon presented to the Commissioner of Internal Revenue a claim for abatement of the assessment that it was proposed to make because of such employment. This claim was denied, for the reason that, upon investigation, it was found that during the taxable year 1919 plaintiff had employed and permitted to work in its factory a child under fourteen years of age.

On September 20, 1921, plaintiff received from the defendant, as Collector, notice of an assessment of $6,312.79, which was a tax of ten per cent on its net profits for the year 1919, together with a statement that if said tax was not paid on or before October 20, 1921, the penalty provided by the Child Labor Tax Act would be imposed.

In order to avoid said penalty and to prevent summary proceedings for the collection of the tax, the plaintiff paid the tax under protest. Thereafter the plaintiff filed a claim for refund, which was denied by the Commissioner of Internal Revenue on or about October 25, 1921.

Plaintiff prays for the recovery of the tax, together with interest thereon at six per cent from the date of payment, upon the ground that the taxing statute is unconstitutional because—

(1) It is not the laying or collecting of a tax duty, impost, or excise to pay the debts and provide for the common defense and general welfare of the United States as authorized by section 8 of Article 1 of the Constitution.

(2) It is not the laying or collecting of taxes on income which, by the Sixteenth Amendment, Congress has power to lay and collect without apportionment among the several States and without regard to any census or enumeration.

(3) It is within none of the powers delegated to Congress by the Constitution or any of its Amendments.

(4) The sole and intended effect of said statute is to prohibit the employment of child labor in manufacturing within the State, and is thus an attempt to control the conditions and methods of manufacture, and therefore is an attempted usurpation of the rights and powers of the various States.

(5) Its enactment by Congress is an attempted usurpation of the powers reserved to the States respectively or to the people, and is

therefore in violation of the Tenth Amendment.

(6) Its enforcement would deprive plaintiff of its property without due process of law, in violation of the Fifth Amendment.

The defendant demurred to the complaint; but the demurrer was overruled and judgment entered for the plaintiff for the amount claimed, the court holding that the statute was unconstitutional as effecting a regulation of a "purely internal affair of the States." This direct writ of error was then sued out.

ARGUMENT.

I.

The Jurisdiction of the Lower Court.

In the first of the two cases, the lower court was without jurisdiction. In the second case jurisdiction is not disputed.

In the first case (*Bailey* v. *George*) a bill was filed to restrain the Collector of Internal Revenue from collecting the tax.

Section 3224 of the Revised Statutes expressly provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The claimed invalidity of a tax has never been held by this court to remove the bar of the statute.

In the leading case of *Snyder* v. *Marks*, 109 U. S. 189, which was a suit to enjoin the collection of a revenue tax on tobacco, it was contended that the tax had been illegally assessed. This court nevertheless held that section 3224 barred the action. After reciting the history of the section and noting that the word "tax" as used therein comprehends an *illegal* as well as a legal tax (p. 192), the court said (pp. 193, 194):

> The inhibition of sec. 3224 applies to all assessments of taxes, *made under color of their*

> *offices*, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. * * * In *Cheatham* v. *United States*, 92 U. S. 85, 88, and again in *State Railroad Tax Cases*, 92 U. S. 575, 613, it was said by this court that the system prescribed by the United States in regard to both customs duties and internal revenue taxes of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the Government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares, by sec. 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed when those officers in the course of general jurisdiction over the subject matter in question have made the assignment [assessment] and claim that it is valid.

In *Dodge* v. *Osborn*, 240 U. S. 118, the appellant sued to enjoin the collection of taxes imposed under the income tax section of the tariff act of October 3, 1913, on the ground that the taxing statute was unconstitutional. This court, affirming the decree

below dismissing appellant's bill, held section 3224 applicable. After quoting with approval the language of the court in *Snyder* v. *Marks*, as set forth above, the court said (p. 121):

> This doctrine has been repeatedly applied until it is no longer open to question that a suit may not be brought to enjoin the assessment or collection of a tax *because of the alleged unconstitutionality* of the statute imposing it. *Shelton* v. *Platt*, 139 U. S. 591; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Board of Public Works*, 172 U. S. 32; *Pacific Steam Whaling Co.* v. *United States*, 187 U. S. 447, 451, 452.

This section has been said by this court to have grown out of the "sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence." (*State Railroad Tax Cases*, 92 U. S. 575, 613.)

It is true that in *Dodge* v. *Osborn*, *supra*, the court assumed solely for the sake of argument that under some exceptional circumstances suits to enjoin the collection of a tax might be brought, but it added (p. 122) that—

> It is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable.

In the Vivian Cotton Mills case the tax was entirely prospective (sec. 1207 of Child Labor Tax Law) and to be paid out of profits. The manufacturer

should have made allowance for this tax before distributing the profits. Indeed, there is no allegation that the entire profits were distributed or that the manufacturer is not able to pay the entire tax from funds in bank. The only allegation is that if the tax is not paid, and the Government resorts to distraint proceedings, some of the manufacturer's property may be sold for an abnormally low return. Certainly the plaintiff has not shown such exceptional circumstances as would warrant the interposition of the court, even if, in spite of the express provision of section 3224 of the Revised Statutes, the court might under some "extraordinary and entirely exceptional circumstance" interpose to prevent the collection of a tax.

The District Court was of opinion that Revised Statutes, section 3224, had no application, because the tax in dispute was not in truth a tax, but a punitive penalty.

Where, on the face of the statute, a tax is nominally imposed, its validity as a tax can not be determined on a bill in equity to enjoin the collector. It does not matter whether the tax is constitutional or unconstitutional. It is still the policy of the law that the question must be determined by a suit for a refund.

Apart from this, can it be questioned that this is a tax? Congress has thus described it, and whether constitutional or otherwise by reason of its incidences, it is nevertheless an excise tax.

It may not be easy to draw a line of demarcation between a punitive penalty and a tax; but the line

of demarcation seems to be that, where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then it is a punitive penalty, and not a tax at all; but, where the thing done is not prohibited, but, with respect to the privilege of doing it, an excise tax is imposed, it is none the less a tax, even though it be, in its practical results, prohibitive. An import tax which absolutely prohibits the importation of a given commodity could not be said to be a punitive penalty, even though it operates to prohibit the importation as effectually as though it were a section of the criminal law prohibiting the importation under any circumstances. In the instant cases, the statute does not pretend to prohibit and does not in fact prohibit the employment of child labor. If a manufacturer desires to employ such labor, he is free to do so; but, if he does so, he must pay an excise tax for the privilege. Where the excise tax is prohibitive in amount, there may be little practical difference between such an excise tax and a penal prohibition; but, theoretically, they are different exercises of governmental power.

II.

The Doctrine of This Court as to the Constitutionality of the Law.

In the Drexel Furniture Co. case the jurisdiction of the lower court does not seem to be open to objection and this court is asked to determine the validity, under the Constitution, of the Child Labor Tax Law, and this, in turn, involves the question as to the extent, if any, to which this court may consider the motives which induced Congress, in the exercise of its power to tax, to select subjects for taxation.

This question is important, but not novel. If it can be regarded as still open to question, in view of the repeated and consistent decisions of this court from *Veazie Bank* v. *Fenno*, 8 Wall. 533, decided in 1869, down to *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, decided in 1921, then the question is of vast importance as a constitutional problem, for it confronts this court with a very serious dilemma.

If, on the one hand, it should hold that the exercise of an undoubted power of the Federal Government to impose an excise tax can be nullified by attributing to the framers of the law a purpose or motive to secure an ulterior end not sanctioned by the Constitution, then an intolerable burden may be put upon this court to determine as to future laws the purpose which Congress may have had in their enactment.

The great and solemn duty of adjudging invalid any enactment of Congress, which is in contravention to the Constitution, has already imposed a very heavy burden upon this great tribunal. It is obvious that if this court were now to assume the added burden of declaring a law unconstitutional, not because of that which it directly provides, but because of some inferable unconstitutional motive, which may have influenced Congress in its enactment, the work of this court would be more delicate than ever.

This is true; but candor requires me to add that it may also be true that if, in our complex civilization, when steam and electricity have intricately unified the relations of life, the powers of the Federal Government can be utilized to secure objectives which are beyond the scope of Federal power, then our constitutional form of Government may prove to be a less effective distribution of powers than is generally believed.

The repeated decisions of this court for the last half century indicate that the former view is the correct one. The contrary view is generally supported by the famous dictum of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 416. Let me quote, in parallel columns, this earlier and a later expression of this court.

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Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 316, at p. 423.

Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, *and is really calculated to effect any of the objects intrusted to the Government*, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. *This court disclaims all pretensions to such a power.*

Chief Justice White in McCray v. United States, 195 U. S. 27, at pp. 55, 56.

It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the Government, *where a wrong motive or purpose has impelled to the exertion of the power*, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power. * * * *The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.*

Between these two statements, there is no necessary inconsistency; for it is to be observed that the latter portion of the extract from the opinion of Chief Justice Marshall above quoted does much to weaken the force of the preceding sentence. As applied to the instant case, the validity of the Child

Labor Tax Law can be sustained without violation to that which Chief Justice Marshall so forcefully said, for it is not contended that the Constitution prohibits an excise tax upon manufacturers, and, to the extent that manufacturers employ child labor, it would yield revenue to the Government and thus effect a governmental purpose.

Moreover, the extract from the opinion in *McCulloch* v. *Maryland*, above quoted, was merely *dictum* on the part of Chief Justice Marshall, for in that case he was not considering the effect of an act of Congress, but of an act of a State legislature, and the precise question now presented was not before him. The question in issue in *McCulloch* v. *Maryland* was whether the Constitution, by necessary implication, forbade a State to tax the agencies of the Federal Government.

It should be further noted that, in the later case of *Brown* v. *Maryland*, 12 Wheat. 419, 439, decided in 1827, the same Chief Justice also said:

> It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend upon the degree to which it may be exercised. *If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.*

Before applying the doctrine of these cases to the instant cases, it seems desirable to fix clearly the premises upon which this court will rest its judgment, and this may be done catechetically as follows:

Q. Has the Federal Government the power to impose an excise tax?

A. It certainly has.

Q. Does the statute in question impose an excise tax?

A. It certainly does; for it provides that manufacturers of a certain class "shall pay for each taxable year in addition to all other taxes imposed by law an excise tax equivalent to 10 per cent of the entire net profits," etc.

Q. Is this a tax in fact as well as in form?

A. It certainly is, and the instant cases prove it; for, in the first case, a suit is brought to restrain a Government official from collecting the tax, and, in the second case, the plaintiff below sues to recover a tax assessed under the statute and already paid into the Treasury of the United States.

Q. What, then, in the last analysis, is the question?

A. It is this: If the Congress imposes an excise tax, can it be invalidated on the *assumption* that the real motive of Congress was not to collect revenue but to regulate child labor?

Assuming that Congress was actuated by the motive thus imputed to it, does the case fall within the doctrine as announced by Chief Justice Marshall, and above quoted?

I think not. Such an excise law is not expressly prohibited, and as it does raise revenue, if a manufacturer exercises his undoubted right to employ child labor, it, in the language of Chief Justice

Marshall, "is really calculated to effect any [one] of the objects intrusted to the Government."

Certainly such a case falls expressly within the doctrine, as announced by Chief Justice White, and above quoted, that this court will not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be executed."

In considering the effect of motive or objective upon the exercise of delegated power, care must be taken to distinguish between the power of this court to invalidate a State statute when it invades the province of the Federal Government and the power of this court to nullify a law passed by Congress, a coordinate branch of the Government. Chief Justice Marshall, in the same case of *McCulloch* v. *Maryland*, 4 Wheat. 416, 435, clearly drew attention to the distinction between them:

> It has also been insisted that, as the power of taxation in the General and State Governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States will equally sustain the right of the States to tax banks chartered by the General Government.
>
> But the two cases are not on the same reason. The people of all the States have created the General Government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their

> representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a Government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a Government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme.

Chief Justice White dwelt further on this distinction in *McCray* v. *United States* (195 U. S. 60). The late Chief Justice fully conceded that when a State adopts a law, the necessary effect of which is to exercise a power granted by the Constitution to the Government of the United States, it must follow that the act is void. But he pointed out that this is due to the paramount nature of the Constitution of the United States. Under Article VI, where there is any conflict between State and Federal activity the Federal Government is supreme. Where, however, Congress in exerting its power to levy taxes deals with a subject, which might also be regulated by the police power of the State, the Federal statute is not nullified by any power which the State might otherwise possess.

Before citing the many authorities in which this court has disclaimed any power to sit in judgment upon the motives with which Congress exercises its delegated powers, let me say that I do not concede that no fiscal reason can be assigned, which justifies the Child Labor Law as a revenue measure. It is notorious that child labor is cheap labor, and this being so, Congress may have considered this privilege of cheaper production as a fiscal reason for the tax.

However, I do not stress this point, for I prefer to add, in the spirit of candor, that if this court is empowered to consider the *motive* of Congress, then the contention that the *dominant* motive of Congress in passing this Statute was to make the employment of child labor expensive by reason of added taxation is not unreasonable.

If so, it is not the first time in the history of taxation that taxes have been imposed for other than fiscal purposes. The question is, not what the motive of Congress is, but does this statute impose an excise tax; and, if so, whether the imposition of such a tax has been forbidden by the Constitution.

Certainly by no *express* prohibition, and it remains to inquire whether it is by an *implied* prohibition.

The doctrine of implied *powers* is a natural and necessary one; but the doctrine of implied *limitations* is one, for which there is little countenance in either the text of the Constitution or its judicial interpretation.

Few, if any, implied limitations upon expressly delegated powers have ever had the sanction of this

court. The greatest of all was that, which was recognized in *McCulloch* v. *Maryland*, and, so far as my knowledge goes, it is the only implied limitation upon the taxing power, and it was decided from an obvious and imperative necessity, for, neither the Federal Government nor the constituent States could possibly continue to exist if either had the power to tax the agencies of the other out of existence.

With this exception, however, this court has said repeatedly that the power to tax is only restricted by the *express* prohibitions of the Constitution, and none can be implied where, as in the instant case, they depend upon a question of fact, viz, the motive for the exercise of the delegated power.

In *In re Kollock* (165 U. S. 526), this court, speaking through Chief Justice Fuller, said:

> The act before us is *on its face* an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, *its primary object must be assumed to be the raising of revenue.* (165 U. S. 536.)

Again, in *McCray* v. *United States* (195 U. S. 27, 50), this court, in one of the late Chief Justice's most powerful opinions, said "that the acts in question on their face impose excise taxes which Congress had the power to levy is so completely established as to require only statement." In that case Chief Justice White, anticipating the argument in the instant case, very forcefully said (195 U. S. 54–59):

It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the Government may exert its lawful powers *with the object or motive of reaching an end not justified*, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. *But this reduces itself to the contention that, under our constitutional system, the abuse by one department of Government of its lawful powers is to be corrected by the abuse of its powers by another department.*

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the Government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions.

And again:

It is of course true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another

> department of the Government where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies not in the abuse by the judicial authority of its functions but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.

And again:

> The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said, from the beginning no case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton* v. *Moore* (178 U. S. 41, 60), the often-quoted statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power *because of the destructive effect of the exertion of the authority.*

The Chief Justice then proceeds to quote with approval the following utterances of this Court, which we requote as follows:

In the License Tax Cases (5 Wall. 462) this Court said:

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, *and thus only*, it reaches every subject, and may be exercised at discretion.

In *Pacific Insurance Co.* v. *Soule* (7 Wall. 433), referring to the unlimited nature of the power of taxation conferred upon Congress, the court observed (p. 443):

> Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

And after referring to the express limitations as to uniformity and articles exported from any State, the court remarked (p. 446):

> With these exceptions, the exercise of the power is, in all respects, *unfettered*.

In *Austin* v. *The Aldermen* (7 Wall. 694) the court again declared (p. 699) that

> The right of taxation, where it exists, is necessarily *unlimited* in its nature. It carries with it inherently the power to embarrass and destroy.

In the leading case above referred to (*Veazie Bank* v. *Fenno*, 8 Wall. 533), where a tax levied by Congress on the circulating notes of State banks was assailed on the ground that the tax was intended to destroy the circulation of such notes, and was, besides, the exercise of a power to tax a subject not conferred upon Congress, the court said, as to the first contention (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.
>
> The first answer to this is that the judicial can not prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

In *Knowlton* v. *Moore* (178 U. S. 41) the cases referred to above were approvingly cited, and the doctrine which they expressed was restated.

In *Treat* v. *White* (181 U. S. 264), referring to a stamp duty levied by Congress, the court observed (p. 269):

> The power of Congress in this direction is *unlimited*. It does not come within the

> province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not. It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In *Patton* v. *Brady* (184 U. S. 608), considering another stamp duty levied by Congress, the court again said (p. 623):

> It is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed.

In *McCray* v. *United States* (195 U. S. 59; see also 60–62) Chief Justice White answered the contention that, because the effect of the tax then considered might be to destroy or restrict the manufacture of the article taxed, the power to levy the tax did not exist. This, he said—

> is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.
>
> Since, as pointed out in all the decisions referred to, *the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.*

In the more recent case of *Flint* v. *Stone Tracy Co.* (220 U. S. 107, 153, 154), the court said, by Mr. Justice Day:

> The Constitution imposes only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. * * * The limitations to which [Chief Justice Chase, in the *License Tax Cases, supra*] refers were the only ones imposed in the Constitution upon the taxing power. * * * The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others.

And in *United States* v. *Doremus* (249 U. S. 86, 94), again speaking by Mr. Justice Day, the court said:

> The only limitation upon the power of Congress to levy taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared that it can not add others. Subject to such limitation Congress may select the subjects of taxations and may exercise the power conferred at its discretion. * * * Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State.

The case of *Hammer* v. *Dagenhart* (247 U. S. 251) does not overrule this long-accepted doctrine.

In that case a statute was passed, as a regulation of commerce, which forbade the transportation in such

commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen had been employed or children between the ages of fourteen and sixteen had been worked more than eight hours in a day.

In that case it was plausibly contended that the real purpose of Congress was not so much to regulate the transportation of commodities as to regulate the method of their production—a matter which concededly is within the exclusive power of the States. Nevertheless, on its face, the statute did provide that given commodities to which child labor presumptively contributed could not be carried in interstate commerce.

The question presented itself whether such a prohibition of the right of transportation could be justified when its apparent purpose was to restrain the producers of the commodities thus transported from employing child labor.

Distinguishing the lottery statute, the pure food and drugs act, the white slave traffic act, the Reed Act, in all of which cases the power to regulate commerce was utilized to accomplish moral ends concededly within the police powers of the States, this court held that in these instances "the use of interstate transportation was necessary to the accomplishment of harmful results," and therefore because of the intimate connection between the sale of such harmful commodities and the transportation thereof these statutes were sustained. This court then proceeded to say (p. 271):

> This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. *The act in its effect does not regulate transportation among the States*, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. * * * When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power.

The decision was rested upon the ground of want of power and not upon motive in exercising a power. This conclusion was reached by a nearly evenly divided court, four Justices concurring in Mr. Justice Day's opinion and four dissenting.

It can not be questioned, and should be freely conceded, that, as a result of this decision, Congress enacted the present law, by which the same end was sought to be accomplished through the greater power of taxation. The substantial difference between the two statutes is that in the former case the prohibition of child labor was sought to be secured by denying to the employers the privileges of interstate traffic, while in the present case the same end is sought by imposing upon the employer a tax in ex-

cess of that imposed upon like manufacturers, who do not employ child labor.

In the former case there was a complete denial of the vital right of interstate transportation, without which many manufacturers could not continue to employ child labor, to products which may never have been manufactured by such labor, while in the instant case an excise tax is imposed upon the employer of child labor. In the former case no reasonable relation was found between interstate transportation and child labor, while a relation always exists between a tax and the subject matter thereof.

It has always been recognized that the right to tax is exceptional in the sweep of its power because of its vital connection with the right of the Government to exist, and because, while the Federal commercial power only relates to interstate and foreign commerce, the taxing power comprehends all taxable objects, whether interstate or intrastate.

III.

Inevitable Incidences of Laws.

In considering this question of invalidating the exercise of a delegated power by reason of its assumed motives or objectives, a distinction should be made between the following classes of cases:

1. Where the exercise of a Federal power has an unquestioned but incidental effect upon some right reserved to the States.

In this case obviously the Federal statute can not be invalidated. Even in the relatively primitive con-

ditions, under which the Constitution was framed, it was inevitable that the exercise of Federal powers would react upon State rights as the exercise of State rights would react upon Federal powers. To-day, when the equilibrium between these two systems of government has been greatly disturbed by the centripetal influences of economic forces, few laws could be passed, either by State or Nation, that would not have such a reflex action. State and Federal powers do not run in parallel lines, which never meet. They run in interlacing zig-zags.

2. Instances where it is clear that Congress in passing a Federal statute not only has a legitimate Federal purpose but may also have been actuated by some motive beyond the province of the Federal Government.

In this case, there is also no power to invalidate a Federal statute. This court could not, even if it would, weigh different motives. It is enough that the statute is an exercise of power for a lawful purpose. That there may have been other and ulterior motives or purposes can not affect the validity of the legislation.

3. Cases where, from the history of the legislation, there is reason to believe that the power was exercised, not to accomplish some purpose intrusted to the Federal Government by the Constitution, but wholly to accomplish by indirect action some purpose which was not within its scope.

Here, too, this court can not invalidate a statute, because, however plausible the inference may be in a given case of an ulterior and unconstitutional motive, it can not judge the motive and object of Congress, either by declarations in debate or even by the history of the legislation. The good faith of Congress in passing the law must be assumed.

4. Cases in which this court can indubitably deduce *from the language of the act* that the exercise of the power was not to accomplish *any* purpose intrusted to the Federal Government, but rather some purpose beyond the scope of Federal power.

Here, if in any case, this court may nullify the law. Such a case was *Hammer* v. *Dagenhart*, *supra*.

Can such a case arise in a taxing statute? Can it be safely adjudged that Congress did not intend to impose a tax, when it expressly says that it does? In *McCray* v. *United States*, *supra*, this court answered this question in the negative.

In the instant case it may be that Congress intended incidentally to regulate child labor by the exercise of its taxing power, but this is one of the cases where Congress, having lawfully chosen the subjects for taxation, its exercise of an undoubted power cannot be challenged, because such tax may have an incidental effect upon some reserved rights of the States. If this were not so, many Federal taxes would be assailed, because it has always been true that in levying taxes Congress has taken into consideration matters

that are beyond the scope of the Federal Government. Before the Revolution the regulations of the Lords in Trade and the impost duties imposed by the Lords in Trade were always used, not for fiscal purposes but as means of regulating commerce.

Following this method of regulating commerce, import duties, and at times internal taxes, have been levied from the beginning in order to accomplish ends, sometimes moral and sometimes economic, which were in themselves not within the scope of Federal power.

Thus when liquor was a permissible commodity it was always recognized that to impose heavy excise taxes upon its sale accomplished a moral purpose, and yet, until the Eighteenth Amendment, the morality of drinking was not a question with which the Federal Government had any concern. But no one ever questioned that a tax which imposed a restrictive influence upon the sale of liquor, and was intended to do so, was none the less a valid tax because of an ulterior moral purpose.

So also, in the leading case of *McCray* v. *United States* (195 U. S. 27), where it may well be supposed that Congress had sought to attain an economic end by means of a taxing statute, this court refused to declare the legislation unconstitutional.[1]

[1] Well-known examples of the use of the taxing power in connection with social or economic ends are the protective tariff system; the tax on foreign-built yachts: *Billings* v. *United States* (232 U. S. 261); on notes of State banks: *Veazie Bank* v. *Fenno* (8 Wall. 533); on importation of alien passengers: *Head Money Cases* (112 U. S. 580); graduation

Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the State. The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress, that is sufficient to sustain it. (*United States* v. *Doremus*, 249 U. S. 86, 93, 94.)

Reverting to the *License Tax Cases*, *supra*, it is clear that they are analogous to the instant cases. The court there conceded that "Congress has no power of regulation *nor any direct control*" over the domestic trade of a State. "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature." (5 Wall. 470, 471.) But the court nevertheless decided unanimously that Congress had power to impose an excise tax upon the sale of liquor wherever the sale was permitted.

So also the question whether child labor may be employed or not is a matter for the determination of

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of taxes: *Magoun* v. *Bank* (170 U. S. 283); *Knowlton* v *Moore* (178 U. S. 41); *Brushaber* v. *United States* (240 U. S. 1) on oleomargarine: *In re Kollock* (165 U. S. 526); *McCray* v. *United States* (195 U. S. 27); on sugar refiners: *American Sugar Refining Co.* v. *Louisiana* (179 U. S. 89). Well-known uses of the power in connection with moral ends are taxes on dealers in liquors and lottery tickets: *License Tax Cases* (5 Wall. 462); on dealers in narcotic drugs: *United States* v. *Doremus* (249 U. S. 86).

the States. But the tax law in the instant cases does not regulate the internal affairs of the States any more than did the taxing statute which was sustained in the *License Tax Cases*. It does not prohibit child labor. It merely requires a manufacturer who employs child labor to pay a tax not imposed upon one who does not employ child labor. Certainly Congress may select the subjects of taxation.

As Mr. Justice Story pointed out in his Commentaries on the Constitution:

> *The power to lay taxes is not by the Constitution confined to purposes of revenue.* In point of fact, it has never been limited to such purposes by Congress; and all the great functionaries of the Government have constantly maintained the doctrine that it was not constitutionally so limited. (Sec. 973.)
>
> The language of the Constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here, and remained in this absolute form (as it was, in fact, when reported in the first draft in the Convention), there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear, from the history of commercial nations, than the fact that the

taxing power is often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of State policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition, and secure a monopoly to the Government. (Sec. 965.)

IV.

Implied Limitations.

It is true, as previously stated (*ante*, p. 22) that this court has consistently recognized, as a necessary implication of the Constitution, that the Federal powers can not be used to destroy the purely governmental agencies of the States. But this necessary limitation, without which our dual form of government could not continue, is limited to purely governmental agencies and can not be extended to the nongovernmental activities of the people of the States or even those of the States as political entities.

This is shown by *Veazie Bank* v. *Fenno*, 8 Wall. 533. The court there held that while the State of Maine could charter a banking corporation, yet that corporation was not a governmental instrumentality and its currency was held to be subject to a prohibitive Federal tax. Similarly, where railroad corporations chartered by Congress claimed immunity from State taxation, it was held that the mere fact that they were chartered by the Federal Government, and were an instrument of interstate commerce, did not save their property from taxation by the States. (Authorities cited in *Choctaw, O. & G. R. Co.* v. *Mackey*, decided by this court June 1, 1921, 41 Sup. Ct. 582, 583.)

The most striking illustration of this is the case of *South Carolina* v. *United States*, 199 U. S. 437, where the government of South Carolina made a monopoly of the sale of liquor and yet, although the agents of the State were its officials, their sales of liquor as such officials were held to be subject to Federal taxation. The powerfully reasoned opinion of Mr. Justice Brewer in this case, to the effect that when a State leaves its purely functional operations as a sovereign and engages in what is normally regarded as private business, it is not, as to such activities, exempt from a Federal tax, shows conclusively that the mere fact that a State has, among its powers, the right to determine the conditions of child labor can not affect the power of the Federal Government to impose an excise tax upon the employer for the privilege of doing business in that way.

This excise tax may be unreasonable, arbitrary, or oppressive, but, as the cases hereinbefore cited show, such considerations are within the discretion of Congress, and that body, representing in a peculiar way the popular will, has the exclusive right of determining the reasonableness of selecting one class for taxation and exempting another, with all the attendant consequences of such discrimination. If it uses its power tyrannically, the remedy can only be with the people who elect the members of Congress.

Nowhere has this been stated more emphatically than in the *Chinese Exclusion Case* (130 U. S. 581, 602, 603), where the court said by Mr. Justice Field:

> If the power mentioned is vested in Congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. *This court is not a censor of the morals of other departments of the Government;* it is not invested with any authority to pass judgment upon the motives of their conduct.

In the much more recent case of *Smith* v. *Kansas City Title & Trust Co.* (255 U. S. 180, 210), decided at the last term, this court said, by Mr. Justice Day:

> But, it is urged, the attempt to create these fiscal agencies, and to make these banks fiscal agents and public depositaries of the Government, is but a pretext. But nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives.

V.

Reasons for Doctrine.

Thus far I have argued the case on the authorities, but as cases of this class are arising with increasing frequency, it may be well to state again the reasons for the doctrine.

I believe that the scope of the judicial power, in the matter of invalidating legislation, has been somewhat obscured, because the question has not been fully considered in the light of the history of the times when the Constitution was drafted.

It is noticeable that, in *Marbury* v. *Madison*, Chief Justice Marshall makes no reference to the history of the Constitutional Convention and did not base his argument upon the teachings of history. This, indeed, is true of all his great opinions, and his example in reaching conclusions upon constitutional questions by reasoning exclusively from the text of the instrument has greatly influenced his successors in this great court.

All of Marshall's great opinions were written before the details of the Constitutional Convention became public property through publication in 1840 of Madison's Debates. Up to that time, little was known as to the deliberations of the Constitutional Convention, and all that was known was little more than gossip and hearsay.

The fact remains, however, that a great historical document can not be considered fully except in the light of the history of the times from which it was

evolved. It was a wise saying of one of the great mediæval legal scholars that the Institutes and Digest of Justinian could not be understood without a knowledge of the history of the times; for "*jurisprudentia sine historia cæca est*," and as a very scholarly Chicago lawyer (John M. Zane, Esq.) recently added, "this is as true to-day as when Cujas lifted the discussion of Roman law above the dry reasoning of the Glossators."

Similarly, a Shakesperian scholar knows that as much light is thrown upon occasional obscure passages in the First Folio by the history of the times as is thrown by a mere reading of the text.

It is, I believe, a common error that, when the Convention of 1787 framed the Constitution, it not only vested a larger power in the judiciary to nullify as *ultra vires* an unconstitutional act, but that, in fact, it created the right which was, as is so commonly stated, a novel contribution to the science of jurisprudence. This, I believe, to be an error; for, in the two countries from which, institutionally, the United States derives its constitutional form of government, there was, prior to the Convention of 1787, a clear recognition of the power of the judiciary to pass upon the *ultra vires* character of a law.

In England the common law was thus stated by Lord Coke in 1610, in *Bonham's Case*, 8 Coke's Reports, 118:

> And it appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is

> against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

This doctrine had the approval of three succeeding Chief Justices—Hobart, Holt, and Popham—and was recognized as the law in Bacon's Abridgment, Comyn's Digest, and Viner's Abridgment. Blackstone gave it some recognition in the Commentaries. "Free John" Lilburne, in the time of the Long Parliament, successfully asserted the invalidity of a statute when it offended fundamental rights.

The constitutional struggle of the Parliament against the Parliament's misuse of its power of taxation was based on the same fundamental consideration.

In the Convention of 1787 three different attempts were made to give to the judiciary complete power of revision over the laws of the Nation and the States in conjunction with the executive. On June 6th this proposition, although supported eloquently by Wilson, Madison, Ellsworth, Mason, Gouverneur Morris, and others, was voted down by a vote of 8 States to 3. On June 21st it was again discussed at length, and this time it was voted down by a bare majority of the vote of one State. On August 15th Mr. Madison, who was the chief proponent of this power of the judiciary, again brought up the plan in a modified form, and this time it was voted down by a vote of 8 States to 3. So opposed were the Framers to an absolute re-

visory power by the courts, that members objected to the inclusion in the Judiciary Article of the words "under the Constitution" and that, when the Judiciary Article of the Constitution was finally passed, it was with the tacit understanding of all members that the power to be exercised by the Court was confined to cases of a "judiciary" character, and not to "extra-judicial" questions, or, as we would now say, political questions. (See Madison's Journal, August 27.)

On August 27, when the eleventh article of the draft Constitution was under consideration, and the above text was reached, the following proceedings took place as reported by Madison:

> Dr. Johnson moved to insert the words "*this Constitution and the*" before the word "laws." Mr. Madison doubted whether this was not going too far, to extend the jurisdiction of the court *generally to cases arising under the Constitution*, and whether it ought not to be *limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.* The motion of Dr. Johnson was agreed to, *nem. con., it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature.*

The beginning of the section thus then read:

> *The jurisdiction of the Supreme Court* shall extend to all cases arising under this Constitution and the laws of the United States and treaties made or which shall be made under their authority.

In spite of the true construction of the amended text being generally supposed in the convention to mean that the jurisdiction of the Supreme Court, in cases arising under the Constitution, was extended to cases of a "judiciary" nature and not extended to all cases generally, whether judicial or extrajudicial, Madison was not satisfied. Not long after, while this section was still under consideration, he says:

> Mr. Madison and Mr. Gouverneur Morris moved to strike out the beginning of the third section, "The jurisdiction of the Supreme Court," and to insert the words, "judicial power," which was agreed to *nem. con.*

The section thus then read:

> *The judicial power* shall extend to all cases arising under, etc.

The Constitution itself now reads:

> The judicial power shall extend to all cases *in law and equity* arising under, etc.

Contemporaneously with this fight in the Constitutional Convention, there was witnessed in France, the other country from which we developed our institutions, the culmination of a struggle of centuries between the political branch of the Government and the Courts. The highest Court of France was known as the "Parlement." From it, our English constitutionalism derives the name of "Parliament;" but the Parlement of France was a judicial body, with legislative powers of revision, while in England, the Parliament is a legislative body, with some incidental judicial powers. The French courts con-

tended that no law had validity until the courts "registered" it. Thus arose a three-century struggle between the king and the courts. (See appendix for details.)

The sequel in both countries is interesting. In France, as a result of the Revolution, all power was vested in the people. The monarchy was abolished, the executive was stripped of power, and the judiciary became elective and was also stripped of its revisionary power over legislation. In England, the Coke doctrine of the revisory power of the judiciary gave place to the present doctrine of the legal omnipotence of Parliament.

In our Nation, as we have seen, the Constitutional Convention voted down any proposition that the judiciary should have an absolute revisionary power over the legislature, which as the representative of the people was regarded as the most direct organ of their will. Both France and the Framers of our Constitution accepted the doctrine of Montesquieu that wherever legislative and judicial powers are concentrated in any one body of men, only tyranny could result. Probably this belief inspired Jefferson in his great distrust of the Federal judiciary and his hatred toward Chief Justice Marshall, for Jefferson was profoundly influenced by the doctrines of the French philosophers, and especially by those of Montesquieu.

Our Constitution created a truer equilibrium of power than France had at that time. We denied to the judiciary the full power of revision over laws, and

thus stripped them of legislative functions. As interpreted, our Constitution provides that the judiciary has no power of revision whatever, except when a concrete case is presented between litigants, and if, in such a case, an *invincible, irreconcilable, and indubitable repugnancy* develops between a statute and the Constitution, the Court applies the Constitution, and thus virtually nullifies the statute. It does not otherwise invade the field of political discretion.

VI.

Political Discretion.

Under our dual form of government, it is inevitable that there should be conflicting incidences of laws. Thus in the most difficult of our problems—the problem of distributing the power over commerce between interstate and intrastate commerce—it is inevitable that all State commercial regulations have an incidental effect upon interstate commerce, and that all Federal trade regulations have an incidental effect upon intrastate commerce.

So, too, it is inevitable that, when the Federal Government exercises its comprehensive power to tax, the incidences of the tax must often affect subjects which are within the reserved rights of the States. An attempt to avert this is as futile as Mrs. Partington's attempt to sweep up the Atlantic Ocean with a mop and broom.

As a result, there are many laws—Federal and State—which are *politically anti-constitutional*, without being *juridically unconstitutional*.

This distinction may be imperfectly grasped by the general public. The impression is general—and I believe that it is a mischievous one—that the judiciary has an unlimited power to nullify a law if its incidental effect is in excess of the governmental sphere of the enacting body. Our whole constitutional jurisprudence, with respect to the dual power over commerce, shows that this is not the fact.

Moreover, there is a large field of political action, into which the judiciary may not enter. It is the sphere of action which may be described as that of political discretion. The motives and objectives of an exercise of a delegated power are always matters of political discretion.

A delegated power can undoubtedly be exercised for a purpose that is within the scope of the enacting body's functions; but its incidences may also be without it. This is as true of the executive as it is of the judicial, and it is true of the legislative. The executive, in the broad discretion that it exercises, may often exercise many powers for an unconstitutional purpose, or in a manner that is opposed to the theory of our Government.

The Executive—although not above the law—can not be subjected generally to the revisory power of the judiciary in many cases of political discretion, even when he is carrying out a challenged law. This was decided by this Court in a case brought in 1867 by a sovereign State (Mississippi) against the President of the United States, to enjoin him from enforcing the Reconstruction

laws, which he had himself vetoed as unconstitutional. (*Mississippi* v. *Johnson*, 4 Wall. 475.)

After a very elaborate argument, this Court, without determining the constitutionality of the Reconstruction laws, wisely held that it would be subversive of the Government for the judiciary to enjoin the President, even if he were embarked on an unconstitutional course of action. The remedy was not in the judiciary, but in Congress, where the House could impeach him and the Senate, as high court of impeachment, could remove him. If they would not act, the ultimate remedy was in the sovereign people.

The same is true of the judiciary. Its actions can not be challenged by imputing to it an ulterior unconstitutional motive. In the Dred Scott decision it was believed throughout the country that this court, in nullifying the Missouri Compromise, did so in order to settle, once for all, the question of slavery, and put it beyond the power of political agitation. If so, such action was anti-constitutional. Even had this been so, the Dred Scott decision remained as a law. If this Court considered a question of political expediency in nullifying a political act, which had been the law for many years, the only remedy was with the people. Lincoln recognized this in accepting the decision *as law* but protesting against it as a continuing *political principle*. The agitation against the Dred Scott decision was possibly the principal cause, next to slavery itself, in precipitating the greatest civil war in history.

If this be true of the Executive and the Judiciary, t is far more true of the Legislature; for the power that makes the laws is peculiarly the representative of the popular will. Undoubtedly if it passes a law, which the Constitution did not empower it to pass, the Supreme Court, in a concrete case between litigants, may nullify it as *ultra vires*. This is due to the absence of *any* power whatever to do the thing.

So delicate a power has been rarely exercised by this Court. In all the thousands of laws that Congress has passed, in the 133 years of our existence as a Nation, not more than thirty laws of Congress have ever been nullified.

It is true that at least a thousand laws of the States have been nullified; but, as previously shown (*ante*, p. 19), the two cases are not in analogy; for the power to nullify a State law arises from the supremacy of the Federal Government, within the scope of its power; but the power of one branch of the Federal Government to nullify a law which has been passed by that coordinate branch of the Government, which is authorized to make laws, does not present the problem of a superior and an inferior, but of a coordinate department of our dual form of Government.

VII.

The Field of Operation True Test.

Therefore the only question can be, when the validity of a law is under question:

Is such a law *in its field of operation* within the delegated power of Congress? The motives of Con-

gress and the incidences of the law are beyond judicial censorship.

In exercising such powers, there is, as with the Executive, an indefinite field of political discretion. Into that field the Judiciary is powerless to go without usurping the very revisionary power over legislation which the framers of the Constitution refused to give to it.

Undoubtedly Congress can pass many laws from motives which are hostile to the spirit, and even to the letter, of the Constitution and which are, therefore, politically anticonstitutional.

For example, if Congress passes a law with the real purpose to coerce the Executive into doing or leaving undone some act which the Executive is constitutionally free to do or leave undone, then the act is politically anticonstitutional. For example, the President has the power to nominate officers of the United States. Suppose that Congress refuses to pass any supply bills unless the President shall nominate designated officials as prescribed by Congress. The act would be plainly politically anticonstitutional. It is the duty of Congress to vote supplies to the Executive; for without such supplies the Government cannot continue. But there is a broad political discretion as to the time when, and the methods by which, the supplies will be granted, and if, in selecting such times and methods, it attempts to coerce the Executive, the Judiciary is impotent to interfere, and the only remedy for such recalcitrancy is with the people.

Congress may pass many laws within the scope of its powers, and yet the real motive or objective of the laws may be the accomplishment of a design which is equally in excess of its true functions and plainly an attempt, by indirection, to accomplish an unconstitutional end.

This is deplorable. It is anticonstitutional. It may be subversive of our form of government; but, here again, the only remedy is with the people.

If the Judiciary attempts to impugn the motives and objectives of a coordinate branch of the Government, whether it be Executive or Legislative, it attempts a futile and impossible task.

In the first place, the motives and objectives are, in nearly all cases, a matter of conjecture. To impute a wrongful motive, where there may be a rightful one, is an intolerable impeachment by one branch of the Government of the work of another. In the case of the Executive, the motive or objective may be in a single brain and may be gathered by his declarations; but in the case of the Legislature, the Judiciary is dealing with a hydra-headed body, and when Congress passes a law it is impossible to determine what motives influenced the various members of the Legislature, or even a majority thereof.

Apart from the futility of the inquiry, however plausible a conjecture may be, there remains a far graver consideration that, while the human mind is what it is, it is impossible to prevent officials, in discharging their duties, from taking into account motives and objectives of a political nature.

Since parliaments began, men who are entrusted with the duty of legislation have, in giving their assent or dissent, considered the incidences of the proposed law—whether social, economic, or moral. This is inevitable. The legislator would not be a statesman who did not take into account what such incidences would be.

This is peculiarly true of all taxing measures. They have rarely, if ever, been levied solely with reference to fiscal necessities. From time out of mind the body that imposed taxes has considered all the varying influences upon the public welfare that such a levy would incidentally entail, and frequently the social, economic, or moral effect of the tax is often a far more influential consideration with the legislature than the mere question of revenue.

As I have shown in other briefs, nothing was more obvious to the Founders of this Republic than the distinction between a tax which was used to regulate trade and a tax that was used to raise revenue. This was the very foundation of our struggle with the mother country. The leaders of the Colonists never disputed that, if Parliament passed a law to control trade—in many respects to prohibit trade altogether—whereby no revenue would result, that it was a constitutional exercise of power. Their real objection was to a tax whose real purpose was to raise revenue from the Colonies for the purposes of the Imperial Treasury; and it was to that kind of tax and that kind of laws that they applied

the maxim: "Taxation without representation is tyranny."

Applying these considerations to the instant case, I argue that, however plausible the conjecture, this Court is powerless to say judicially that the motive of Congress in levying the tax under consideration was not to impose a tax, but to regulate child labor; and I further argue that, even if it were, that the fact remains that if, in levying the tax upon manufacturers that employ child labor, it did so with a recognition that such a tax might result in no revenue at all, and virtually prohibit the employment of child labor, that such purpose, while it may be *politically anti-constitutional*, in the sense that it may indirectly and incidentally regulate a matter otherwise within the discretion of the States, yet it is not *juridically unconstitutional*, because it is an exercise of an undoubted power to impose a tax; and the motives and objectives of the tax are within that broad field of political discretion into which the judiciary is powerless to enter. To use Madison's phrase, it is an "extra-judicial" question and as such beyond the power of the court.

VIII.

Remedy is With The People.

I recognize that this doctrine, carried to its logical conclusion, could, if Congress should utilize *all* its great powers to accomplish ulterior ends, go far to subvert our form of government. To that possibility I can not be blind; but, nevertheless, the remedy is not with the judiciary, but with the people.

The belief that the judiciary is fully empowered to sit in judgment upon the motives or objectives of other branches of the Government is a mischievous one, in that it so lowers the sense of constitutional morality among the people that neither in the legislative branch of the Government nor among the people is there as strong a purpose as formerly to maintain their constitutional form of Government.

Let this Court clearly say that in this broad field of political discretion there is no revisory power in the Judiciary, and that the remedy must lie in the people, then, if there be any longer a sufficient sense of constitutional morality in this country, the people will themselves protect their Constitution.

The erroneous idea that this court is the sole guardian and protector of our constitutional form of government has inevitably led to an impairment, both with the people and with their representatives, of what may be called the constitutional conscience.

It is the common belief that groups of men can agitate for any kind of a law, without considering its constitutional aspects; for, if it be unconstitutional in substance or in motive, the Supreme Court will avert the evil of its enactment. This indifference to our form of government, which is now so widely prevalent, has its reflex action upon the representatives of the people, both in the legislatures of the States and of the Nation. When laws are discussed which go to the verge of constitutional power, the principal, and sometimes the only, discussion is that

of policy, while the effect of such legislation upon our constitutional form of government is given little attention. The prevalent disposition seems to be to ignore constitutional questions by shifting them to the Supreme Court, in the belief that that court will exercise the full powers of revision, which I have tried to show the Framers of the Constitution did not intend this court to have. The result may be an exaltation of this court, as a tribunal of extraordinary power; but, in the matter of constitutionalism, it inevitably leads to an impairment of the powers and duties of Congress and, above all, to the impairment of the popular conscience; for, in the last analysis, the Constitution will last in substance as long as the people believe in it and are willing to struggle for it.

No one recognized this better than the Father of his Country, to whom, above all men, the Constitution owes its existence. Writing to his friend and comrade in arms, Lafayette, on February 7, 1788, Washington, in speaking of the merits of the new Constitution, said:

> These powers are so distributed among the legislative, executive, and judicial branches into which the Government is arranged that it can never be in danger of degenerating into a monarchy, an oligarchy, or an aristocracy, or any other despotic or oppressive form, *so long as there shall remain any virtue in the body of the people*. I would not be understood, my dear Marquis, to speak of consequences which may be produced in the evolution of ages by corruption of morals, profligacy of manners,

> and listlessness for the preservation of the natural and inalienable rights of mankind, nor of the successful usurpations that may be established at such an unpropitious juncture upon the ruins of liberty, however providentially guarded and secured, as these are contingencies against which no human prudence can effectively provide.

In this connection, it may be questioned that, however beneficent constitutional limitations themselves are in restraining the possible tyranny of the majority, yet constitutional limitations do not, in one respect, tend toward the preservation of constitutional liberty, for they weaken the vigilance of the people in preserving such liberty. It may be questioned whether, in countries like England, where Parliament is omnipotent, there is not a keener sense to defeat legislation which offends the fundamental decencies of liberty than in this country, where the people place their dependence upon the constitutional limitations and their reliance upon the judiciary to enforce them. England and Canada have no constitutional limitations which forbid the taking of property without due process of law; and yet the constitutional conscience in both their legislatures is sufficiently keen to defeat any law which offends the great principles of Magna Charta.

In this country, however, confiscatory legislation is freely passed, without much consideration of its oppressive features, because of the belief that, in every case, the Supreme Court will come to the rescue.

All this means a lessened spirit among the people of that eternal vigilance which is said to be the "price of liberty." The results of this decay of what Grote called "constitutional morality" were never better stated than by de Tocqueville in his remarkably prophetic book:

> The species of oppression by which democratic nations are menaced is unlike anything which ever before existed in the world. * * * Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent, if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood. * * * After having thus successively taken each member of the community in its powerful grasp and fashioned them at will, the supreme power then extends its arm over the whole community. It covers the surface of society with a net work of small, complicated rules, minute and uniform, through which the most original minds and the most energetic characters can not penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting; such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies

> a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd. (De Tocqueville, Democracy in America, Vol. II, pp. 332–333; "The World's Great Classics" Edition.)

Unless the people themselves awaken to the fact that they themselves must defend and preserve their own institutions, and not rely wholly upon this court as a tutelary guardian, then that situation will come to pass which Shakespeare, although not a jurist or statesman, but only a philosophic poet, so well stated in one of the least known of his plays:

> Force should be right; or, rather, right and wrong,
> (Between whose endless jar justice resides)
> Should lose their names, and so should justice too.
> Then every thing includes itself in power,
> Power into will, will into appetite;
> And appetite, an universal wolf,
> So doubly seconded with will and power,
> Must make perforce an universal prey,
> And last eat up himself.
>
> (Troilus and Cressida, Act I, scene 3.)

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Special Assistant to the Attorney General.

FEBRUARY, 1922.

APPENDIX.

THE STRUGGLE IN FRANCE BETWEEN THE LEGISLATIVE AND THE JUDICIAL POWER.

In the reign of Louis XI, the judiciary assumed an independent organization, somewhat similar to the English Inns of Court. Before the middle of the fourteenth century, the judges were, to some extent, independent, *de jure* as well as *de facto*, and early in the fifteenth century the King did not disdain to appear before the Court, as plaintiff or defendant.

The Courts finally became organized into a High Court of Appeals, two lower Courts of first instance, and a Court having criminal jurisdiction, and it became geographically divided into "Parlements" of the different provinces of France.

The method of administration was that no law proclaimed by the legislature (which was rarely in session) or by the King, who had legislative as well as executive powers, could become a law until it was "registered." If the Courts refused to register the law, the King summoned a *lit de justice* and heard the objections of the judges. A deadlock then frequently ensued. If the King insisted upon the registration of the law, the Courts—meaning thereby both the Bench and the Bar—refused to administer the laws, and thus virtually boycotted the political branch of the Government. If the King was insistent, he could only compel acquiescence of the judiciary by using the Bastile as a court of last resort and consigning the judges to its tender mercies. The collisions between the two were not infrequent.

Thus, in the reign of Francis I, the King concluded The Concordat with the Pope and thus repealed the Pragmatic Sanction; and the judiciary refused for two years to register The Concordat.

Later, the same King published a law on poaching, and the Parlements refused to register it.

About 1590, Henry II attempted to legalize the Inquisition as a political institution, and again the judiciary refused to register it.

Richelieu, in the height of his power, never successfully crushed the power of the Courts.

Mazarin, his successor, at the very time when Cromwell was challenging the supremacy of the Stuarts, attempted to crush the Courts, and there resulted in France the war of the Frond. This was precipitated by the attempt of Mazarin to throw the leading judges into prison. Civil war developed. Paris became an armed camp. Mazarin prevailed, and the "Sun King," Louis XIV, showed his contempt of the judiciary by appearing before the Parlement de Paris booted and spurred, as for the chase, and with a riding whip in his hand, and demanded that the judges register some law which he proposed.

With the passing of the Sun King, the struggle was renewed. In 1753, the King (Louis XV), angered by the power of the Courts, suspended all their proceedings. By unanimous vote, the 158 judges wholly suspended the administration of justice. Thereupon the King imprisoned a number of the leading judges and exiled others; but, after a year of public inconvenience, the exiled judges were restored to power.

Simultaneously with the beginning of our own Revolution, the fight was renewed in France.

In 1771, the King issued a law to compel the peasants to work by conscription. The judiciary refused to register the law.

The crisis culminated in January, 1771, when the King's soldiers knocked at the door of each magistrate and required an immediate answer whether he would open his Court. A few said yes, but many said no. They were immediately banished and their offices confiscated. The King then organized a new Court, which became known as the Maupeou Parlement. This Court had a very short life, and went out of power in general contempt, due to the revelation of its subserviency and corruption in the famous case between Beaumarchais and Goezman.

France then returned to its former independent judiciary, and the fight was renewed. Louis XV promulgated two laws for a stamp and a land tax, and thus the culmination of the constitutional struggle in France, as a similar struggle in the Colonies, turned on the question of taxation. The King summoned the judges before him, and, under threats,

compelled them to register the laws. The judges returned to their Courts and adjudged that the registration was void, as under duress, and canceled it. The King ordered the arrest of some of the judges. The Courts then announced the principle that questions of taxations belonged to the people and demanded the convocation of the States General, the legislative body of France. They also proclaimed the irremovability of the judges and their immunity from arrest. The King at once issued warrants for the arrest of the two leading judges. Believing that they would have immunity, if actually on the Bench, the Court was hurriedly convened, and ordered a permanent session. For 36 hours, the Court remained in session, until the King's soldiers broke into the Palais de Justice and carried the whole Court into custody. The King thereupon organized a new Court, with plenary powers, and disturbances broke out in Paris and many of the provinces of France. To end the crisis, the Prime Minister summoned a meeting of the States General, which had not been in session for over 150 years, and when they met on the 5th of May, 1789—just two years after our own Constitutional Convention—the French Revolution virtually began.

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No. 657

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

J. W. BAILEY AND J. W. BAILEY AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NORTH CAROLINA, PLAINTIFFS IN ERROR,

v.

DREXEL FURNITURE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO ADVANCE.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1921.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

J. W. BAILEY AND J. W. BAILEY AS COLLECTOR of Internal Revenue for the District of North Carolina, plaintiff in error,

v.

DREXEL FURNITURE COMPANY, DEFENDANT in error.

No. —.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO ADVANCE.

The Solicitor General moves to advance the above-entitled cause for hearing on January 3, 1922, with the appeal in *John Hill, jr., et al., appellants,* v. *Henry C. Wallace, Secretary of Agriculture, et al., appellees,* No. 616, October term, 1921.

Whether or not Title XII of the revenue act of 1918, being section 1200, et seq., of chapter 18, act of Congress approved February 24, 1919, known as the "child labor tax act" (40 Stat. 1138), is constitutional is the question. While presented on somewhat different facts, the question of constitutional power bears a substantial similarity to that

presented in No. 616, *supra*, the validity of the "future trading act."

Protests are accompanying payments of taxes under the so-called child labor tax act and presented reclaims will stand undisposed of pending the determination of the validity of the act. The public interest is involved.

Counsel for ~~appellants~~ plaintiff in error concur in the motion.

JAMES M. BECK,
Solicitor General.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 657.

J. W. BAILEY, AND J. W. BAILEY AS COLLECTOR OF INTERNAL REVENUE, &C., PLAINTIFF IN ERROR,

vs.

DREXEL FURNITURE COMPANY.

ABSTRACT OF ORAL ARGUMENT FOR THE DEFENDANT IN ERROR.

WM. P. BYNUM.
Counsel for the Defendant in Error.

(28,612)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 657.

J. W. BAILEY, AND J. W. BAILEY AS COLLECTOR, PLAINTIFF IN ERROR,

vs.

DREXEL FURNITURE COMPANY, DEFENDANT IN ERROR.

ABSTRACT OF THE ORAL ARGUMENT OF WM. P. BYNUM FOR THE DEFENDANT IN ERROR.

The argument for the defendant in error may be stated in four propositions:

1. In our dual system of Government no power exists in either the national or State governments to enact a law the necessary effect of which is a direct encroachment upon an acknowledged exclusive power of the other.

2. The standardization of the ages and the regulation of the hours of labor of persons in mines and factories within the States is an exclusive power of the States to which the Federal authority does not extend.

3. The necessary effect of the act of Congress known as the Child Labor Law, the validity of which is assailed in this suit, is to encroach directly upon this acknowledged exclusive power of the States.

4. The fact that this effect is sought to be accomplished under color of a tax does not bring the statute within the power of Congress, and renders it none the less unconstitutional and void.

I.

It is true that the Constitution contains only one exception and two qualifications as to the taxing power of Congress: the exception that it cannot tax exports and the qualifications that it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity.

It is not true, however, that the taxing power of Congress is without constitutional limitation other than as contained in these exceptions.

The Government in its brief seeks to establish the proposition that, aside from this one express exception and these two express qualifications, Congress has unlimited and uncontrolled power of taxation, free from other constitutional restraint, and restricted only by its discretion. I have not had the advantage of seeing the Government's brief in this suit, but in the case of the *Atherton Mills v. Johnston*, in-

volving the same question as that which is presented here, the Government sought to establish its position by the citation, among others, of the following cases and of quotations of expressions therefrom, the wording of which it is contended established that proposition:

Nichol v. Ames, 173 U. S., 509, 515.
McCray v. United States, 195 U. S., 51.
License Tax Cases, 5 Wall., 462, 471.
Pacific Insurance Co. v. Soule, 7 Wall., 433, 443.
Austin v. The Aldermen, 7 Wall., 694, 699.

This proposition is the cardinal principle upon which the argument for the Government is based. It is the major premise from which it seeks to reach the conclusion that the tax on the employment of child labor is within the constitutional power of Congress and, if its position on this point is unsound, its conclusion as to the constitutionality of the statute falls with it.

An examination of these cases shows that the expressions relied on by the Government to establish its basic proposition are general and unnecessary to the decisions upon the facts before the court. The decisions in these cases in no way establish the proposition contended for by the Government and several of the opinions implicitly or explicitly negative that conclusion.

In *Nichol v. Ames*, the court was passing upon the constitutionality of a Spanish-American war-stamp tax on sales or agreements to sell on any exchange or board of trade. There was no suggestion that Congress, under the guise of a tax statute, was encroaching upon an exclusive power of the

the grant of power to tax conferred by the Constitution upon Congress." We do not attempt to maintain the contrary of this. It is well recognized that the inhibition upon taking property without due process of law contained in the Fifth Amendment has no reference to taking by taxation. As to the Tenth Amendment, we do not contend that it added any limitation upon the taxing power of Congress which did not exist already by implication before the adoption of that amendment. It added nothing to the constitutional limitations already existing arising from the fundamental principles of the original instrument and from the dual system of government which it established. It was simply an expression of limitations which already existed by implication, and was adopted out of the abundance of caution to emphasize these fundamental limitations. The expression of the *McCray case* is simply that, as to any taxing power of Congress admittedly granted to it by the original Constitution, the Tenth Amendment had no effect to take away such power. The question before the court now is whether, under the principles of the Constitution which existed before and were expressly declared by the Tenth Amendment there is a grant of power to Congress to do what it has done by the enactment of the Child Labor Law.

The *License Tax cases*, 5 Wall., 462, far from establishing the proposition that there are no constitutional limitations upon the powers of Congress under the tax clause other than the express reservation as to exports and the express qualifications as to apportionment and uniformity, are strong authority for the proposition that a direct encroachment by Congress under the guise of the taxing power upon matters the regulation and control of which are within the exclusive

power of the States would violate constitutional limitations and be void. Those cases involved the constitutionality of a Federal license tax on the sale of lottery tickets and liquor. It was argued that those taxes were unconstitutional because in the States from which the cases came the sale of liquor and lottery tickets was absolutely prohibited, and because the payment of the Federal license or tax would give permission or authority to do what was declared to be a crime by the law of those States and would therefore destroy the State regulation of matters exclusively within the States' control. The decision that the Federal statutes were valid was based specifically on the holding that they did not authorize the sale of the prohibited articles in violation of State law and therefore did not interfere with the State regulation. It was virtually conceded by the court (p. 472) that if the payment of the Federal license tax did give authority to sell in violation of the State regulation the Federal statute, although a tax statute, would be unconstitutional. The court distinctly recognized the field of exclusive State authority which Congress has no constitutional power to invade even under its tax powers. It said:

> "It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms. * * * But very different considerations apply to the internal commerce and trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the

> business of citizens transacted within a State is warranted by the Constitution, except such as is *strictly incidental* to the powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject."

Then follows the statement as to the extensiveness of the taxing power relied upon by the Government; but the opinion thereafter affirmatively declares that there are fundamental limitations on the power which Congress may not constitutionally overstep, saying:

> "If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution. * * * Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the National Government. There would be great force in it if the licenses were regarded as giving authority, *for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.* * * * There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States."

I shall endeavor to show that in the case at bar there is a "direct conflict between National and State legislation on a subject which the Constitution places under the exclusive

control of the States." For the present it is sufficient to point out that the decision in the *License Tax cases* recognizes that where such direct conflict does exist the national legislation is unconstitutional, and that the decision in those cases in no way supports the proposition to which the Government cites them, but affirmatively declares limitations upon the taxing power of Congress other than the express exceptions and qualifications.

As to the case of *Pacific Insurance Company v. Soule*, 7 Wall., 433, 443, the first sentence of the paragraph, which the Government omits from its quotation of the rest of the paragraph on page 443, shows that the quotation only means that where the particular exercise of the taxing power by Congress is admittedly within constitutional limitations, the extent to which that exercise may go is unlimited. That important sentence is:

> "Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature."

The question at bar is not the extent to which an admittedly valid exercise of the power to tax may go, but whether the particular exercise of the supposed power is within the constitutional authority of Congress at all. To cite *Pacific Ins. Co. v. Soule* is to beg the whole question at bar. Besides, that the part of the paragraph relied on by the Government is *dictum* is shown by an examination of the question before the court to be decided. It was simply whether a tax upon the business of an insurance company was a direct or indirect tax. If direct, the statute under con-

sideration was void because the tax was not apportioned. The court held it to be an indirect tax.

In the case of *Austin v. The Alderman*, 7 Wall., 694, 699, from the opinion in which the Government quotes the expression "The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy," the reference was to the tax power of a State, not to the tax power of Congress. That expression on its face, as the expression quoted from *Pacific Insurance Company v. Soule*, assumes that the power exists, and then merely declares that its extent or degree is unlimited. The constitutionality of an exercise of the taxing power, even by the State, was not before the court. A Federal statute had authorized States to require the inclusion in the valuation of personal property of a taxpayer's shares in national banks *at the place where such bank was located and not elsewhere*. A statute of Massachusetts purported to require the listing of such shares owned by taxpayers within that State if the bank was located anywhere within the State. Austin lived in Boston and owned shares in national banks all of which were located in Boston, so that the facts of his case were within the strictest construction of the Federal statute. He objected that the State statute was invalid, as being beyond the grant of the Federal statute, since it would require the inclusion of shares in any national bank within the State and not simply at the place where the bank was located. The State Supreme Court held that "place" in the Federal statute meant "State," and that the two statutes were consistent. The question before the United States Supreme Court was not whether the State tax statute was valid, nor whether its construction by

the State court was correct, but whether, even if that construction were incorrect, the plaintiff was entitled to relief because in his case every bank in which he held shares was located in the place (Boston) where he lived and returned for taxes. The holding was simply that under the strictest construction of the Federal statute the action of the State with regard to Austin was valid, and he had no remedy on the ground that the State statute might give rise to another state of facts which would violate the Federal statute.

We see, therefore, that the cases relied on by the Government do not sustain its major premise; that aside from the one express exception and the two express qualifications on the taxing power of Congress that power is absolutely without constitutional limitation and is only controlled by the discretion of Congress, but that, on the other hand, most of them are authorities to sustain the negative of that proposition.

That contention at once appears unsound, however, when we see that limitations other than those expressed have been declared to exist, arising from the fundamental principles of the Constitution itself and from the fundamental necessity of maintaining inviolate the dual system of government established by that instrument.

If the proposition which the Government lays down were true, Congress could tax anything in existence except exports, and could achieve any object or result by a tax statute so long as it observed the qualifications of uniformity and apportionment, and this court could never declare unconstitutional any act of Congress purporting to levy a tax except on the ground that it was a tax on exports, or that it

violated either the rule of uniformity or that of apportionment.

This, however, I do not understand to be the law, and to show that it is not it is sufficient to recall that Congress has been held not to have such power, and that this and other courts have held unconstitutional taxing statutes of Congress for other reasons and have held that other constitutional limitations on the taxing power exist.

By virtue of *implied limitations* on the taxing power of Congress, arising from the fundamental principles of the Constitution itself, it has been held:

That the salary of a State judicial officer cannot be taxed by Congress;

Collector v. Day, 11 Wall., 122;

That Congress has not the power to tax municipal bonds within a State;

Pollock v. Farmers' L. & T. Co., 158 U. S., 630;

That Congress has no power to tax revenues of a municipal corporation;

U. S. v. Baltimore, etc., R. Co., 17 Wall., 327;

That Congress has no constitutional power to impose a tax on the tax certificates issued by State authority at a tax sale;

Barden v. Columbia County, 33 Wis., 447;

That Congress has no power to tax legal process in the State courts.

Smith v. Short, 40 Ala., 385.

Jones v. Keep, 19 Wis., 370.

There is no express limitation in the Constitution upon which these decisions are based. Each of them is grounded upon limitations necessarily implied from the fundamental principles of the Constitution itself, the independence and sovereignty of the national and State Governments respectively within the sphere of their acknowledged powers, and the law of self-preservation, which necessitates the maintenance of the dual form of government upon which our Republic is founded.

The taxing power of Congress, as well as all the other powers of the Federal Government, is subject to these fundamental limitations, necessarily implied from the principle of the Constitution establishing the dual system of a national government and State governments each independent and sovereign within its own sphere of power.

It is elementary that the Constitution is not a restriction upon powers already existing in the Government of the United States, but is an enumeration of powers granted to the Federal Government by the people.

Gibbons v. Ogden, 9 Wheat., 1, 187.
Calder v. Bull, 3 Dall., 386.
Briscoe v. Bank of Kentucky, 11 Pet., 257.
Gilman v. Philadelphia, 3 Wall., 713.
U. S. v. Cruikshank, 92 U. S., 542, 550, 551.

The national Constitution is the instrument which specifies the enumerated powers of the Federal Government and in which authority must be found for the exercise of any power which that Government assumes to possess.

Cooley's Constitutional Limitations, 11, n. 2, cases there cited.

It is also elementary that the powers not granted to the Federal Government by the Constitution remain in the sovereign States and in the people.

Lane County v. Oregon, 7 Wall., 76.
Collector v. Day, 11 Wall., 113.

In the case last cited the court said, page 124:

> "It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or to the people.'"

The power of the States to regulate their purely local affairs by such laws as seem wise to local authorities is inherent in sovereignty, has never been surrendered to the General Government, and is beyond the power of the General Government to take away or destroy.

New York v. Miln, 11 Pet., 102, 139.
Slaughter House cases, 16 Wall., 36, 63.
Kidd v. Pearson, 128 U. S., 1, 21.
Hammer v. Dagenhart, 247 U. S., 251.

The result is that the General Government, on the one hand, and the respective State governments, on the other,

are separate and distinct sovereignties, each having a sphere of authority independent of any control by the other, and each acting independently and with sovereign powers in its respective sphere.

McCulloch v. Maryland, 4 Wheat., 315, 409, 402.
Lane County v. Oregon, 7 Wall., 71, 76.
Collector v. Day, 11 Wall., 113, 124.

In *McCulloch v. Maryland* it was said by the Chief Justice:

> "In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other."

and, again:

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people into one common mass."

In *Collector v. Day*, *supra*, the court said:

> "The General Government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the General Government as that government within its sphere is independent of the States."

The power of the States to regulate their purely local affairs and to perform the high and responsible duties expressly reserved to them in the organic law, being a sovereign power, is free from control, abridgment, or destruction by the Federal Government; and the taxing power of Congress as well as all other powers of the General Government is subject to this fundamental and inherent limitation necessarily implied from the paramount principle of the Constitution itself. Any statute of Congress directly abridging or encroaching upon this sovereign power of the States is not the law of the land, and the courts should hold it unconstitutional and void.

Collector v. Day, 11 Wall., 113.

Turner v. Williams, 194 U. S., 279, 295, concurring opinion.

McCulloch v. Maryland, 4 Wheat., 315, 422.

Hammer v. Dagenhart, 247 U. S., 251.

Gordon v. United States, 117 U. S., 697.

In *McCulloch v. Maryland*, Chief Justice Marshall further said:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

In *Gordon v. United States*, *supra*, the court, speaking through Chief Justice Taney in his last written opinion, said:

> "The reservation to the States respectively can only mean the reservation of the *rights of sovereignty* which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

That this limitation applies to the taxing power of Congress as well as to all other powers of the Federal Government is held in the case of *Veazie Bank v. Fenno*, 9 Wall., 533, wherein the court, speaking of this power, said:

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised *for ends inconsistent with the limited grants of power in the Constitution.*"

The same limitations upon the taxing power, implied from the very nature of the Constitution, are declared to exist by Judge Cooley in his Constitutional Limitations, wherein he says:

> "These (the qualifications of apportionment and uniformity) are express limitations, imposed by the Constitution upon the Federal power to tax; but there are some others which are implied, and which, under the complex system of the American Government, have the effect to exempt some subjects otherwise tax-

> able from the scope and reach, according to the circumstance, of either the Federal power to tax or the power of the several States" (page 589).

After a review of the implied limitations upon the taxing power of the States arising from these same general principles of division of sovereignty between the State and Federal governments and the necessity of maintaining the complete independence of the Federal Government within its sovereign sphere, and after a review of the cases of *McCulloch v. Maryland*, 4 Wheat., 316, wherein it was held that States could not tax operations of the National Bank; *Dobbins v. Commissioners*, 16 Pet., 435, wherein it was held that a State could not tax an officer of the General Government on his offices and emoluments, and *Weston v. Charleston*, 2 Pet., 449, wherein it was held that a State could not tax obligations or evidences of debt of the National Government. Judge Cooley continues, on page 592:

> "If the States cannot tax the means by which the National Government performs its functions, neither, on the other hand and for the same reasons, can the latter tax the agencies of the State governments."

The matter is set at rest by the highly authoritative decision in the case of *Collector v. Day*, 11 Wall., 113, wherein, as we have seen, a Federal tax on incomes was held unconstitutional as applied to the income from his office of a judicial officer of the State. It was admitted by the court that there was no express limitation upon the taxing powers of Congress applicable to the case, but the decision was placed distinctly on the ground that the establishing of its judiciary was merely the means whereby the State carried into effect

one of its sovereign and reserved powers; that to allow another sovereignty to interfere by taxation with the exercise by the State of its sovereign powers would be to take away from those powers their sovereign character and to expose the State to destruction. The exercise of the supposed taxing power of Congress in that case was held to violate implied constitutional limitations, upon the principle of self-preservation, necessary both to the States and to the Federal Government as a Union of the States. It was said by the court:

> "Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States. * * * Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable that, without them, the General Government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and *fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limit but the will of the legislative body imposing the tax.* * * *
>
> "We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the General Government from levying the tax, as that depends upon the express power 'to lay and collect taxes,'

but it shows that it is an original inherent power never parted with, and, in respect to which the supremacy of that government does not exist, and is of no importance in determining the question; and, further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the General Government stand upon as solid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in *Dobbins v. The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons actually exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. *In both cases the exemption rests upon necessary implication*, and is upheld by the *great law of self-preservation;* as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.

> Of what avail are these means if another power may tax them at discretion?"

The same truth was expressed by Pinkney in his argument in the case of *McCulloch v. Maryland,* when he said:

> "A power to build up what another may pull down at pleasure, is a power which may provoke a smile, but can do nothing else."

A power in the States to make regulations of domestic matters entirely within the scope of their sovereign and exclusive powers, which regulations, however, the Federal Government might pull down at pleasure by the use of its taxing power, would be as futile as would have been the power of the Federal Government if the decision in *McCulloch v. Maryland* had upheld the right of the State of Maryland to tax the notes of the national bank.

It was very strenuously contended by the Attorney General of the United States, in *Collector v. Day,* just as it is contended by the Government in this case, that although the taxing power of the States is admittedly subject to implied limitations which prevent its being used to effect invasions of fields of control or regulation given over to the exclusive power of the United States, still the taxing power of the Federal Government is not subject to like implied limitations against invasion of the exclusive powers of the States because of the supremacy of the Federal Government over the States; that since the taxing power is granted to the Federal Government without express limitation, and since the Federal Government is supreme in its sphere, therefore its taxing power is supreme and unlimited and its ex-

ercise is valid even though it may directly abridge or destroy the control or regulation by the States of matters within their exclusive and sovereign power. That is the whole of the argument of the Government to sustain this law. And that argument was conclusively answered by this court in the *Day case*. The Federal Government is supreme in its own sphere, but that sphere does not extend into and overlap the reserved sphere of the States—that realm which they have kept for themselves and in which they are now and always have been the sole and exclusive sovereign. The existence of two distinct and separate governments, both having sovereign control of the same subject matter, is an anomaly. It is repugnant to the very conception of sovereignty.

As this court said in the *Matter of Heff*, 197 U. S., 488, 505:

> "There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the nation and not divided between the two."

That the police powers of the States, in so far as they relate to those internal affairs which have never been surrendered or restrained, are essentially complete, unqualified, and exclusive in the individual States, and cannot be assumed by the National Government by any means or assumption of power whatsoever is too well settled in our constitutional law to admit of dispute.

New York City v. Miln, 11 Pet., 102.
License Tax cases, 5 How., 504, 599.
New York v. Dibble, 21 How., 366, 370.

Patterson v. Kentucky, 97 U. S., 501, 503.
Barbier v. Connelly, 113 U. S., 27.
Bowman v. Chicago, etc., R. Co., 125 U. S., 465.
In re Rahrer, 140 U. S., 545.
Plumley v. Massachusetts, 155 U. S., 461.
Lhote v. New Orleans, 177 U. S., 587.
Ambrosini v. United States, 187 U. S., 1, 6.
Matter of Heff, supra.

In the case of *In re Rahrer, supra*, the court held, Mr. Chief Justice Fuller delivering the opinion:

> "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the General Government, nor directly restrained by the Constitution of the United States, and essentially exclusive. * * *
>
> "In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment. *Barbier v. Connolly*, 113 U. S., 27, 31."

In the case of *New York City v. Miln, supra*, it was said:

> "I can discriminate no line of power between the different subjects of internal police, nor find any principle in the Constitution, or rule for construing it by this court, that places any part of a police system within any jurisdiction except that of a State, or which can revise or in any way control its exer-

> cise, except as specified. Police regulations are not within any grant of powers to the Federal Government for Federal purposes; Congress may make them in the Territories, this District, and other places where they have exclusive powers of legislation, but cannot interfere with police of any part of a State. As a power excepted and reserved by the States, it remains in them in full and unimpaired sovereignty, as absolutely as their soil, which has not been granted to individuals or ceded to the United States; as a right of jurisdiction over the land and waters of a State, it adheres to both, *so as to be incapable of exercise by any other power, without cession or usurpation.*"

As shown by all the authorities cited above, the exclusive character of the State's sovereignty within its reserved powers is the same as the exclusive character of the Nation's sovereignty within the scope of its granted powers. As shown by all those authorities, there are the same implied limitations upon the taxing power of Congress to prevent it from being used to invade or destroy the State's exclusive powers as there are upon the taxing powers of the States to prevent a like invasion or destruction of the Nation's exclusive powers. These reciprocal limitations upon either government are in each case based upon the same ground, the necessity of preserving the sovereignty of the other for the perpetuation of our dual system of government.

Just as the familiar rule holds that a State's power to tax, although not expressly limited is by necessary implication so limited that, for instance, it cannot impose a direct burden on interstate commerce, although it may impose a purely indirect and incidental burden thereon, the very same prin-

ciples of constitutional law prohibit the Congress from using its taxing power to impose a direct burden or regulation upon a matter within the exclusive scope of the State's authority, although the fact that an otherwise valid statute of Congress has an *incidental* regulatory effect upon such matters does not render it unconstitutional.

This is the true distinction pointed out in the *License Tax cases*, 5 Wall., 462, quoted above, wherein it was said:

> "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is *strictly incidental* to the powers clearly granted to the Legislature."

An otherwise valid exercise of the Federal taxing power will not be invalidated by reason of the fact that it has the effect of strictly incidental interference with a matter within the exclusive power of the States, but there is no constitutional authority for a direct, primary, or destructive interference by Congress, through pretended exercise of its taxing power or any other power, with matters within the exclusive scope of the State's sovereign authority.

We conclude that in our dual system of government no power exists in either the National or State Government to enact a law the necessary effect of which would be a direct invasion of or encroachment upon an acknowledged exclusive power of the other.

II.

The Standardization of the Ages and the Regulation of the Hours of Labor of Persons in Mines and Factories Within the States is an Exclusive Power of the States to Which the Federal Authority Does Not Extend.

This has been specifically decided in the recent case of *Hammer v. Dagenhart*, 247 U. S., 251, wherein this court held unconstitutional the former Federal Child Labor Law, which, under the guise of a regulation of interstate commerce, had the necessary effect to standardize the ages and to regulate the hours of labor of children in mines and factories.

The court first held that the thing intended to be accomplished by the statute—its necessary effect—was to standardize the ages and regulate the hours of labor of children in mines and factories within the States, saying:

> "The *thing intended to be accomplished by this* statute is the denial of the facilities of interstate commerce to those manufacturers of the States who employ children within the prohibited ages. The act *in its effect* does not regulate transportation among the States, but *aims to standardize the ages at which the children may be employed in mining and manufacturing within the States.*"

And again:

> "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial com-

modities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority."

The court then specifically held that the standardization of the ages and regulations of the hours at which children might be employed in mines and factories within the States is a matter within the exclusive power of the States and a matter to which the Federal authority does not extend. It said:

"The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

"Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. 'This,' said the court in *United States v. DeWitt*, 9 Wall., 41, 45, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions that we think it unnecessary to enter again upon the discussion.' See *Keller v. United States*, 213 U. S., 138, 144, 145, 146. Cooley's Constitutional Limitations, 7 Ed., p. 11. * * *

"And in *Dartmouth College v. Woodard*, 4 Wheat., 518, 628, the same great judge (Marshall) said:

" 'That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted.'

"That there should be limitations upon the right to employ children in mines and factories in the in-

terest of their own and the public welfare all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject. In North Carolina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

"It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; 'this principle,' declared Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat., 316, 'is universally admitted.' * * *

"The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall., 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. *New York v. Miln*, 11 Pet., 102, 139; *Slaughter House Cases*, 16 Wall., 36, 63; *Kidd v. Pearson, supra.* To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but *would sanction an invasion by the Federal power* of the control of *a matter purely local in character*, and over which no authority has

been delegated to Congress in conferring the power to regulate commerce among the states. * * *

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority. *Thus the act in a twofold sense is repugnant to the Constitution.* It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the Federal authority does not extend."

III.

The Necessary Effect of This Law is to Encroach Directly upon This Acknowledged Exclusive Power of the States.

In construing an act of Congress with a view to determining its constitutionality, it is necessary for the court to consider its natural and reasonable effect.

This is held in the following cases:

Collins v. New Hampshire, 171 U. S., 30, 33, 34.
Hammer v. Dagenhart, 247 U. S., 251, 275.

In the first case cited this court held invalid a State statute making it a crime to sell oleomargarine that had not been artificially discolored pink. There was nothing in the statute itself to show that the purpose of the Legislature in passing it was to prohibit sales of oleomargarine altogether.

But, looking at the natural and reasonable effect of the statute, the court found that to color oleomargarine pink would be to give to that wholesome article of food a nauseating and repulsive color and thus to render it utterly unsalable as a food commodity, and therefore held that the statute, although in the form of a regulation, was in effect a prohibition. It said:

> "To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

The same doctrine and the same authority was reaffirmed and applied to the construction of acts of Congress in the late case of *Hammer v. Dagenhart*, 247 U. S., 251, wherein it was said:

> "A statute must be judged by its natural and reasonable effect. *Collings v. New Hampshire*, 171 U. S., 30, 33, 34."

The necessary effect of this law is the same as that of the former Child Labor Law, declared unconstitutional in Hammer v. Dagenhart, namely, to standardize the ages and to regulate the hours of labor of children in mines and factories.

In the *Dagenhart case* the court held unconstitutional the Keating bill, Act September 1, 1916, C. 432, 39 Stat. 675. It held that this act, under the form of a regulation of interstate commerce, was really in effect a regulation of the employment of child labor within the States.

That act purported to close the channels of interstate commerce to—

> "any article or commodity the product of any mill, cannery, workship, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or after the hour of six o'clock antemeridian."

It will be noted that that statute did not in terms prohibit the employment of children under fourteen years of age or the employment of children under sixteen at night. The manufacturer or mine owner was free to employ children within these ages and to ship and sell the product of their labor within the State. He could even ship the product of their labor in interstate commerce if he waited thirty days. However, the court held that the necessary effect of this provision would be not to stop the movement of goods in interstate commerce, but to force the manufacturer and mine owner to conform to the Federal standard of ages and hours of labor of children.

The Supreme Court having held this Keating bill un-

constitutional as being in effect a regulation by Congress of a matter within the exclusive regulatory power of the States, and as being an unauthorized encroachment on the sovereign authority of the States, Congress attempted to achieve the very same object, almost immediately after the decision, by a use of the taxing power instead of its power over interstate commerce. The effort to regulate by Federal enactment these purely internal matters under the commerce clause having failed, the bludgeon of the Federal taxing power, armored with the *dicta* as to the unlimited extent of this power to which we have already adverted, was brought into use, and with it Congress sought to bring the domestic institutions and industries of the States into conformity with its idea of what should be a uniform regulation of the employment of children; to regulate a matter over which it had already been adjudged to have no control, and thus sought to recall and nullify the decision of this Court in the *Dagenhart case*.

In the face of that adjudication, it sought to assume an authority which has never been delegated, on the specious assumption that the taxing power has unlimited scope, which enables Congress to project the authority of the Federal Government into realms clearly barred to it by the Constitution and to do things which are admittedly beyond its power to do in any other way.

Title XII, Federal Tax Act of 1918, takes *verbatim* from the Keating bill the important regulatory words and inserts them into the body of a tax statute. It enacts that any person operating any mill, cannery, workshop, factory, or manufacturing establishment in which children have been employed within the very same limits as to ages and hours pre-

scribed in the unconstitutional Keating bill during any portion of the taxable year shall pay for that taxable year, in addition to all other taxes, an excise tax equivalent to 10 per centum of the entire net profits for the year.

It will be noted that the tax is not measured by the amount of products of child labor. If one child within the prohibited ages should work one hour during the year in a factory employing five thousand laborers the tax would be measured by 10 per cent of the total net profits from the labor of the five thousand for the entire year.

It will further be noted that this statute is even more far-reaching in its regulatory effect than the Keating bill. Under the former statute children could be employed in violation of the Federal regulation provided the products were only shipped or sold in intrastate commerce, or in interstate commerce after thirty days from the employment. But the present statute inflicts its ten per cent penalty, called excise tax, in every case where the Federal regulation as to ages and hours is not obeyed, even though the products of the excised labor never get into interstate commerce.

Looking at these two statutes together, the conclusion is unavoidable that not only their purpose and intent, but their necessary result and their reasonable and natural effect, is the same—that effect declared by this court in the *Dagenhart case* "to standardize the ages at which children may be employed in mining and manufacturing establishments within the States" (p. 272) * * * and * * * "to regulate the hours of labor of children in factories and mines within the States, a purely State authority" (p. 276).

Just as in the case of *Collins v. New Hampshire*, although

the statute in form purported to be a mere regulation of the conditions in which oleomargarine should be sold, the court held that in reasonable and natural effect it was not a regulation but was an absolute prohibition of the sale of oleomargarine; just as in the *Dagenhart case*, although the statute in form purported to be a regulation of interstate commerce, the court held that it was not such a regulation, but was a regulation of employment of labor within the States; just so in this case it is clear that, although in form a revenue statute, this act is in reasonable and natural effect exactly the same thing as the act declared unconstitutional in the *Dagenhart case*, a regulation of employment of labor within the States.

Just as under the Keating bill the manufacturer would not cease to ship his goods in interstate commerce, but would cease employing children in violation of the Federal regulation, so under the present act the manufacturer will not pay the prohibitive tax of 10 per cent of his total net profits for the year, but will be at great pains to conform to the regulation of the Federal statute. Interpreting this statute in the light of its reasonable effect, as the court must, it cannot be found that it will have the effect to raise revenue; it must be found that its reasonable effect will be to standardize the ages and hours of employment of children. No reasonable man would choose to pay the prohibitive tax of 10 per cent in order to be free from the Federal regulation. This is the actual effect of the statute since its enactment, as will appear from the report of the Commissioner of Internal Revenue hereinafter referred to.

The only distinction between the two acts as to reasonable and natural effect is that this act has a far more complete

and far-reaching regulatory effect than the Keating bill would have had if it had stood, since the present act is in no way limited in application to cases where goods are shipped in interstate commerce, but purports to enforce the Federal regulation in all cases.

The language of the district court, in its opinion in this case, is very apt:

> "In determining that question the necessary result of the statute must be taken into consideration 'even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Collins v. New Hampshire*, 170 U. S., 30, 33, 34.
>
> "The purpose of the act in question appears upon its face. It is disclosed by its title and by its scope and inevitable effect. Through the medium of a tax, Congress here, as through the medium of a regulation of commerce in the act of September, 1916, has attempted to fix the standard of labor for mines, quarries factories, mills, etc., in the various States. *The act was not intended to, nor will it, raise revenue.* This was admitted, if not openly declared by its sponsors during its passage through Congress. It was intended solely to prohibit the employment of child labor. Whatever else it may be in theory, it is in substance and in fact a tax upon the employment of child labor and is so labeled by Congress. The title of the act is "A tax upon the employment of child labor.' In other words, it is a frank attempt to regulate a purely internal affair of the States, evidently because in the opinion of Congress the States have not regulated it as the Congress thinks it should be regulated."

Again, in the case of *George v. Bailey*, 274 Fed., 63 another case in which the same district court held this sta ute unconstitutional, it is said after quoting from the *Da enhart case:*

> "There can be no possible misunderstanding as t the meaning of this decision, for it distinctly de clared that the right to regulate labor within a Stat is a State function and that Congress is forbidden b the Constitution to interfere with it.
>
> "After the Dagenhart decision, Congress has un dertaken to avoid its effect by enacting section 120 of title 12 of 'An act to provide revenue and for othe purposes,' approved February 24, 1919 (40 Stat. a Large, part 1, page 1057). This section is in the fol lowing language (quoting the section):
>
> * * * * * * *
>
> "It will be noted that this section is practically a reproduction of the material provisions of the Owen Keating bill; the only difference being that under that bill the product of an establishment using child labor, was forbidden transportation in interstate com merce, and in the present act an establishment using child labor contrary to its provisions is subject to a tax of 10 per centum upon the net income derived from its operation.
>
> "The question which suggests itself in the outset is whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object. It is more reasonable to conclude that the purpose of the tax feature is to impose a penalty in order to deter the violation of the child labor provision. It would be rather a non-productive revenue system which imposed taxes, the effect of which would be to

annihilate the subject of taxation, or to prohibit the exercise of the privilege for which the tax is levied."

To standardize the ages and regulate the hours of labor of children in mines and factories is not only an acknowledged and adjudged exclusive power of the sovereign States, but it is a power which has been exercised by North Carolina by a full and excellent statutory regulation much superior to the regulation attempted by the Federal statute.

We have already seen that this is a matter exclusively within the power of the States and to which the constitutional authority of Congress does not extend. The State of North Carolina has already, prior to the enactment of this statute, occupied the field of this its exclusive power by a very full and excellent regulation. Consolidated Statutes 5031-5038.

This statute is part of a general chapter entitled "Child Welfare," and the first section creates a Child Welfare Commission, composed of the State superintendent of public instruction, the secretary of the State board of health, and the commissioner of public welfare of the State. It is made the duty of this commission to make and formulate such rules and regulations for enforcing and carrying out the provisions of this article as in its judgment shall be deemed necessary.

Section 5032 forbids the employment of any child under the age of fourteen years "in or about or in connection with any mill, factory, cannery, workshop, manufacturing establishment, laundry, bakery, mercantile establishment, office, hotel, restaurant, barber shop, bootblack stand, public stable, garage, place of amusement, brick yard, lumber yard,

or any messenger or delivery service, *except in cases and under regulations prescribed by the commission herein created.*" Employment in *bona fide* canning clubs is excepted, as in the Federal statute.

Section 5033 prohibits absolutely the employment of persons under sixteen years in any of the named businesses at night and in quarries or mines at any time.

Section 5034 provides for the issuance of age certificates, under regulations by the commission, to protect the employer to the extent of being *prima facie* evidence of the age of the child and the good faith of the employer.

Inspections by agents of the commission are provided for, obstructions of such inspections are rendered unlawful, and the entire statute is sanctioned by making a violation of any of its provisions a misdemeanor, punishable by fine or imprisonment, or both, within the discretion of the court.

Pursuant to this statute, the State Child Welfare Commission created thereby, in executive session, has made and promulgated in a public document, among others, the following rules and regulations which have the force of law in North Carolina:

> "1. No child of any age under 16 years shall be permitted to work in any of the occupations mentioned in section 5 (C. S. 5032), before 6 o'clock in the morning or after 9 o'clock at night. This ruling is made mandatory by section 6 (C. S. 5033), and the law gives no discretion to the commission to modify the same.
>
> "2. No girl under 14 years of age shall be permitted to work in any of the occupations mentioned in section 5 (C. S. 5032). The reason for this is that if

the womanhood of the State is to be properly conserved in the future, girls of tender age certainly should not be allowed to run the dangers of association inherent in employment in public places.

"3. No child under 14 years of age shall be employed in any of the occupations mentioned in section 5 (C. S. 5032), for more than eight hours in any one day.

"4. Boys between 12 and 14 years of age may be employed in the enumerated occupations when the public school is not in session when it is shown to the County Superintendent of Public Welfare or other authorized agent of the Commission that the proposed employment is not to the injury of the health or morals of the child. But in no case shall such employment be legal until a certificate has been issued by the County Superintendent of Public Welfare or other authorized agent of the commission on blanks furnished by the State Commission. Before determining the question the County Superintendent of Public Welfare or other authorized agent, may, if he deem it necessary, require a physical examination of the child by the public health officer or other practicing physician. The Employment Certificate is to be issued only upon documentary evidence or proof of age as required by the Commission.

"5. During the time that the public school is in session boys between 12 and 14 years of age may be employed on Saturday and out of school hours on the same conditions as above, provided that such employment does not interfere with their school work. Where school officials have provided for what is known as continuation schools, and where arrangement has been made to make the outside employment a unit of

> the school work, boys of this age may be, in specific cases, allowed to be occupied in employment during school hours for a limited time, at the discretion of the superintendent of the school."

Further rules and regulations, made and promulgated by the Commission subsequently to the foregoing, require that before boys under 14 may be employed, under the foregoing rules, there must issue from the Superintendent of Public Welfare an age certificate, that before the age certificate or the employment certificate shall issue there must be required a school record for the child applicant prepared by a school official or teacher according to the regular form of school record approved by the Department of Education. A further regulation makes it mandatory to have a physical examination in any case of application of child under 16 for employment certificates. It is also provided by regulation that the Superintendent of Public Welfare or other agent of the State Commission shall suspend any certificate for employment when a condition is found that will injure the health or morals of a child pending the action of the Commission, or revoke any certificate issued on false evidence.

This regulation by the State is better than the attempted Federal regulation because, first, it is enforced by criminal penalty and is a direct, absolute, and proper police regulation; second, it is a fuller protection of child life, since it does not leave it even possible for an employer to pay a penalty and continue to employ children within the forbidden ages; third, it is elastic, rules of the Commission making employment adaptable to particular circumstances, so as to allow beneficial work in moderation by children attaining

certain standards of strength and fitness; fourth, it is directly related to the public-school system and the public-welfare system of the State.

As to the comparative merits of this system and the Federal statute, the District Court of the United States for the Western District of North Carolina said, in the opinion in the case of *George v. Bailey, supra;*

> "The Child Labor Law of North Carolina is made a feature of the public-school system of the State, thus concentrating the means for the promotion of the mental and the physical welfare of children under one harmonious plan, to be carried out by the agencies provided for in the act, the purposes of which are to foster the health and physical development of children, and at the same time train their minds for future usefulness, and its provisions appear ample to accomplish these ends.
>
> "By comparing the Federal and State statutes it will be readily seen that the latter affords as much protection to the health and physical condition of children as the former, and as stated before the State act co-ordinates its purpose to promote physical welfare, with provisions for mental training, and, further, an important provision of the State statute is the punishment provided for its violation. Instead of undertaking as the Federal act, to make the income of an establishment using child labor illegally, the subject of taxation, it denounces as a criminal offense the violation of its provisions and subjects the offender to a fine or imprisonment, or both at the discretion of the court.
>
> "There can be no doubt as a general proposition that the average person is more heedful respecting laws constituting crime than they are those creating

civil liability. For this reason the State statute is undoubtedly more capable of prompt execution than the act of Congress, and the expenses incident to it when compared to that of the Federal plan, must necessarily be a great deal less; but, however that may be, the burden incident to the enforcement of the State law, is not a drain upon the Federal Treasury but is borne by the State * * *.

"There could be no reasonable ground for dissenting to what Congress has done, if the action came within the scope of power delegated to the United States by the Constitution; but, as before stated, the Supreme Court has put an end to this question, and has decided in terms not susceptible of difference of opinion that Congress is not authorized to deal with this subject with the view of Federal control, but that such is the function of the several States, each to proceed in its own way.

"The State of North Carolina has undertaken to utilize the power reserved to it by the Constitution of the United States to control child labor within its borders, and through the General Assembly a law which is deemed wise, regulating this character of labor, has been enacted and provisions made for its endorsement."

The necessary effect of this Federal statute, if it be sustained, is to destroy the exclusive power of the State of North Carolina and other States to regulate child labor within their borders in such manner as they may deem best.

We have, therefore, this field of regulation adjudged by the highest authority to be a matter within the exclusive power of the States and a matter to which the Federal power does not extend. We have a sovereign State enacting a

full and satisfactory regulation in this field, enforced by criminal punishment, rendered elastic and adaptable to the needs and circumstances of individual cases, thoroughly safeguarded in the interests of the child, and closely related with all the important agencies of health, education, and public welfare of the State.

In general outline, the regulations of the Federal and State statutes are the same: no employment of children under sixteen in mines and quarries; no employment of children under sixteen at night; no children under sixteen to be employed more than eight hours a day, and a general age limit of 14 for day work.

The vital difference, however, is that under the State regulation, in cases where boys between 12 and 14 are physically fit, where they have the required school attendance, where proper evidence as to age is submitted, and where the Public Welfare Commissioner upon investigation adjudges that the employment desired will not be injurious to health or morals, there will be issued certificates for employment which absolutely authorize such boys to enter employment and authorize employers to employ them. Under the Federal regulation, on the other hand, there is no such provision, and the prohibitive 10 per cent tax would be imposed even in cases where the employment was thus specifically authorized by the State.

The State recognizes, as declared in the regulations of the State Child Welfare Commission, that:

> "It is still true that an 'idle brain is the devil's workshop,' and juvenile delinquency arises in nearly all cases from idleness or lack of proper direction of youthful energy."

It therefore authorizes employment of boys between 12 and 14, out of school hours, and with every safeguard as to their morals, health, and education. The Federal regulation cuts straight through at the age limit of 14, without elasticity, without regard for the needs or welfare of the individual case, and prohibits by penalizing the employer of any child under fourteen. The very difference between these two systems shows that the Federal Government is not the authority to establish such police regulation, and that the State governments are.

However, we are not concerned with policy, but with power. We have it adjudged that this field of regulation is exclusively within the scope of State authority. We have the State exercising that power in full and satisfactory manner. And we have Congress enacting a statute, the necessary effect of which is to establish an additional regulation of the same subject-matter which is absolutely repugnant to the regulation which North Carolina has already made and which it and it alone had exclusive authority to make.

The State of North Carolina, exercising this exclusive power to provide police regulations for the welfare of its people, examines the case of a boy of thirteen and for his own welfare, and under every safeguard, authorizes him to seek employment out of school hours in a certain manufacturing establishment and in like manner positively authorizes the manufacturing establishment to employ that boy. This is admittedly an exercise of the sovereign and exclusive power of that State.

But, if this statute be sustained, the Federal Government takes away from that boy his right to earn a livelihood out of school hours and his right to train himself in habits of

industry, granted him by his State, and takes away from that manufacturer the right which has been granted him by the State to employ that boy, by imposing upon the manufacturer a prohibitive 10 per cent tax on his total net profits for the year. No manufacturer will employ such a boy and subject himself to the Federal penalty. The result inevitably follows that the Federal Government has taken from the boy the right which the State has granted and from the State the power to give force and effect to its own law. The State regulation, though admittedly within the State's exclusive power, is nevertheless nullified or rendered impotent by the Federal regulation.

It must be conceded that to render the Federal regulation valid and its enactment must be within the power of Congress and that, since Congress is supreme within its sphere, the Federal regulation must prevail over that of the State. The State regulation must be invalid in every respect in which it differs from the Federal regulation. This necessarily means that the exclusive power of the State over this matter is destroyed. It can only be exercised at the pleasure of Congress. Congress can, if it sees fit, raise the age limit to 16 in all cases and increase its penalty to 100 per cent instead of 10. The so-called power of the State would be at the mercy of Congress. It would be, in the language of Pinkney, "the power to build up what another may pull down at pleasure." It would not be a sovereign power. It would not be an exclusive power. It would not be a power at all, but only a permissive right revocable at the will of Congress.

Such a situation is utterly incompatible with the sovereignty of the States. By all the authorities it is a condition

which cannot exist under our institutions. By all the authorities, an act of Congress which seeks to bring about or would have the effect to produce such a condition is an act beyond the power of Congress to enact. It is an act the power to pass which has never been delegated to Congress. It is not therefore the law of the land.

This is not inquiring into the motives of Congress, but looking at the necessary, obvious, and inevitable effect of the statute itself.

But the Government argues that when Congress has passed a law the courts cannot examine into its motives in order to determine the validity of the act; that Congress in this case has the power to tax and that power may be exercised in its discretion; that the court has no right to consider the motive or purpose with which the statute was passed, whether to raise revenue or as a police regulation purely. The Government argues that when it is said that, although in form a tax statute, this legislation is in effect a police regulation destructive of the rights of the States, that is simply an attack upon the motives of Congress to which this court will not listen.

This is not a question of the motives of Congress, but of the reasonable, natural, and necessary effect of the legislation passed by Congress. The same argument was made in the *Dagenhart case*, and this court answered it in these words:

> "We have neither authority nor disposition to question *the motives of Congress* in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations

> and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other. In our view the *necessary effect* of this act is * * * to regulate the hours of labor of children in factories and mines within the States, a purely State authority."

The same argument was made by the Government in the district court in the case of *George v. Bailey*, 274 Fed., 639, wherein Boyd, J., held this present act unconstitutional, and the court answered it in these words:

> "There can be no criticism of the purpose our representatives had in view in the enactment of these statutes, for it is evident that they were prompted by the highest motives of humanity, accompanied with a desire to protect children from mental and physical deterioration, in order to maintain a standard of manhood and womanhood fully prepared to respond to the obligations and duties resting upon the citizens of this country. There could be no reasonable ground for dissenting to what Congress has done, if the action came within the scope of power delegated to the United States by the Constitution."

It is a question of the effect of this legislation and of the power of Congress to produce that effect, and not of the motives of Congress.

IV.

The Fact That This Effect is Sought to be Accomplished under Color of a Tax Does Not Bring the Statute Within the Power of Congress and Renders it None the Less Unconstitutional and Void.

All the powers delegated to the Federal Government are subject to the fundamental limitations arising from the system of dual and divided sovereignty established by the Constitution.

We have already seen that the great underlying principle upon which our Republic is founded is the principle of divided sovereignty between the States and the Nation, of a National Government of limited and delegated powers supreme within its sphere, and of State governments retaining in themselves or the people all of the powers of sovereignty not delegated to the Nation and supreme and exclusive in the exercise of those powers.

We have seen that the taxing power of Congress, as well as its other powers, is necessarily subject to the limitations of this fundamental principle, and has frequently been adjudicated so to be.

The test of the constitutionality of an act of Congress is therefore whether it has any obvious and reasonable relation as a means to the accomplishment of an end within the scope of one of the powers so delegated.

This principle of construction was laid down by Mr. Hamilton, when Secretary of the Treasury, in his opinion on the

constitutionality of the National Bank Act, and has been followed by this court. In that opinion Mr. Hamilton said:

> "The *relation* between the measure and the end; between the *nature* of the means employed toward the execution of a power, and *the object of that power* must be the criterion of constitutionality, not the more or less necessity or futility. * * *
>
> "But the doctrine which is contended for is not chargeable with the consequences imputed to it. It does not affirm that the National Government is sovereign in all respects, but that it is sovereign to a certain extent—that is, to the extent of the objects of its specified powers.
>
> "It leaves therefore, a criterion of what is constitutional, and of what is not so. This criterion is the *end*, to which the measure relates as a *means*. If the *end* by clearly comprehended within any of the specified powers, and if the *measure have an obvious relation to that end*, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion, which may materially assist in the decision: *Does the proposed measure abridge a pre-existing right of any State or any individual?*"

As Pinkney said in his argument in *McCulloch v. Maryland*,

> "The power to lay and collect taxes will not execute itself. Congress must designate in detail all the *means of collection*,"

and then he proceeds to lay down the criterion of constitutionality in words very similar to Mr. Hamilton's:

> "The judiciary may, indeed, and must, see that what has been done is not a mere *evasive pretext*, under which the national legislature travels out of the prescribed bounds of its authority, and encroaches upon State sovereignty, or the rights of the people. For this purpose, it must inquire, whether the means assumed *have a connection, in the nature and fitness of things, with the end to be accomplished.*"

The same criterion was adopted by Chief Justice Marshall in his opinion in that case. He said:

> "Let the end be legitimate, let it be within the scope of the Constitution, and by all means which are appropriate, which are *plainly adapted* to that end, which are not prohibited, but consist with the letter and *spirit of the Constitution*, are constitutional."

That criterion of constitutionality has been adhered to by this court ever since.

An act of Congress purporting to be a tax statute is valid and constitutional only if it have a reasonable relation or be plainly adapted to the end of raising revenue.

The taxing power is given to Congress in these words of the Constitution:

> "SEC. 8. The Congress shall have power:
> "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."

The purpose of the grant was to enable Congress to raise revenue to pay the debts and provide for the common defense and general welfare.

Applying the foregoing criterion to any act of Congress in the form of a tax statute, the first thing to do is to see if the end aimed to be accomplished is legitimate and within the scope of the power conferred. If the end of the statute is clearly and directly to raise revenue, it is legitimate and within the scope of the Constitution. If it is to establish a police regulation of matters within the exclusive power of the States, it is not. It will be admitted that it is only when the end or object is the raising of revenue that an act of Congress in the form of a tax is constitutional.

The second thing to do in applying this criterion is to determine whether the *means* adopted by the statute in question have any *natural or obvious relation* or are *plainly adapted to* the constitutional end of raising revenue.

That the exercise of a power beyond the constitutional grant to Congress, under the pretext or form of a granted power, is not the law of the land and must be held void, was further held by Marshall in *McCulloch v. Maryland*, wherein he said:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

Although a revenue act of Congress may be valid as such in spite of the fact that it *incidentally interferes* with the

police powers of the States, this can be so only where it has *a real relation to the raising of revenue.*

United States v. Doremus, 249 U. S., 86.

This was a case wherein Doremus was indicted under the Harrison Narcotic Act, which required the payment of a license tax of $1.00 a year to sellers, dispensers, and distributors of certain drugs, and the use of certain forms for recording and publicity of sales and gifts of such drugs, and punishing violations as crimes. The district court, as stated in the opinion, held the statute unconstitutional on the theory that it was not a revenue measure, but was an invasion of the police power of the States under the guise of a tax (page 89).

The Supreme Court reversed the decision of the district court, holding that the statute was constitutional because it had a *direct and real relation* to the raising of revenue, that it was in reality a revenue act. It was said by this court:

> "Of course Congress may not in the exercise of Federal power exert authority wholly reserved to the States. Many decisions of this court have so declared."

The usual distinction, and the familiar one, that courts cannot concern themselves with the "motives" of the legislature in passing the act, was then made:

> "And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. *If the legislation enacted has some reasonable relation* to the exercise of the taxing authority conferred by the Constitution, it

> cannot be invalidated because of the supposed motives which induced it."

And it was specifically held that the act in question had reasonable relation to the raising of revenue:

> "Considering the full power of Congress over excise taxation, the decisive question here is: *Have the provisions in question any relation to the raising of revenue?* * * * Considered of themselves we think they tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law."

Thus in the *Doremus case*, one of the latest utterances of the court, it affirmed and applied again the old criterion of constitutionality so lucidly proclaimed by Mr. Hamilton and so authoritatively adopted and incorporated in our jurisprudence by Marshall in *McCulloch v. Maryland*.

Of course the tax of $1.00 a year would be readily paid by those engaged in selling and dispensing narcotics and revenue would be raised. And the act was upheld distinctly upon the ground that it was clear that it had a natural and reasonable relation to the raising of revenue, and that it would have the necessary effect of a tax or revenue act. The statute had a reasonable relation as a means to the end of raising revenue, and that end was within the scope of the Constitution.

We have seen that this is not a question of the motives of Congress, but simply of the necessary and reasonable effect of the statute.

This court will take judicial notice of public documents emanating from Departments of the Government, and will consider them whether they form a part of the records of the case or not.

New York Indians v. United States, 170 U. S., 32.

See also:

Brown v. Piper, 91 U. S., 42.
Bank v. Adams Express Co., 93 U. S., 185.
Brown v. Spillman, 155 U. S., 670.
Mills v. Green, 159 U. S., 657.
The Delaware, 161 U. S., 472.
Nichol v. Ames, 173 U. S., 517.
United States v. Rio Grande, etc., Co., 174 U. S., 698.
1 Greenleaf on Evidence, Secs. 5, 6.

Under this well-known rule the court will take judicial notice of the Document No. 2896 of the Treasury Department, being the Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ending June 30, 1921, which report shows conclusively that the present child-labor law has no reasonable or natural relation to the raising of revenue, and is in no way adapted to that end.

On page 16 of that report it is stated that the personnel of the Child Labor Tax Division comprises 51 persons. We may assume that these persons are employed at an average of not less than $2,000.00 a year salary. This gives an annual expense for salaries alone of $102,000.00. It may be

well assumed that the expenses of administering this law in Washington and in the field, the defraying of traveling expenses of inspectors, etc., will raise the total expense of the Government in enforcing this law to many times $102,000.00.

On the same page we see that for the year 1919 the total receipts of "taxes collected" from the "Child Labor tax" were nothing; for the year 1920, $2,380.20, and for the year 1921 $24,223.67. In other words, for the fiscal year 1921, it cost the Federal Government several hundreds of thousands of dollars to collect total returns of $24,223.67 from the operation of what is now contended to be a statute having a reasonable relation as a means to the end of raising revenue. At a total expense of about three times that for 1921, the Government has, therefore, taken into its treasury a total of only $26,603.87 in the three years 1919-1921.

Of this total amount paid into the Treasury, undoubtedly a large part is in litigation now, paid under protest. The present case involves over $6,000. Although this amount was paid under protest in the fiscal year 1922, still it is an index of the status of Government revenues under this act. The entirely insignificant amounts paid in are paid under duress, and are then litigated.

From this we see that the Government has spent many hundreds of thousands of dollars over and above receipts during three years in an effort to enforce this attempted regulation of child labor. In the face of this it cannot be pretended that this statute has any reasonable relation to the raising of revenue.

What has actually happened, the real effect of the statute as it has been enforced, is precisely what we have shown to be its natural and necessary effect when construed on its face. The employers have conformed to the Federal regulations, and no tax has been paid. The Government has had no revenue from the tax. But it has accomplished a police regulation within the States which it had no constitutional authority to effect.

This is directly shown again by the language of the Commissioner's report. He says (page 18):

> "Federal certificates of age are issued in a number of States where child-labor law requirements are less exacting than are those provided for by the tax law. Such certificates are issued by child labor officers in the States of Georgia, Mississippi, North Carolina, South Carolina, and Virginia. * * *
>
> "The 23,017 applications received in the five States where Federal certificates of age are issued is 29 per cent below the number recorded for the preceding year. This decrease is *largely due to the increased tendency of the employer to refuse employment to those under 16.*"

The Commissioner himself declares that the statute has an increased tendency, not to raise revenue, but the very reverse, to force employers to conform to the Federal police regulation.

It results that this statute has no obvious, natural, or reasonable relation to the raising of revenue or taxes and is in no way adapted to that end. It is therefore unconstitutional, because not a means plainly adapted to, or having a natural, obvious, or reasonable relation to, an end within

the scope of the power of Congress. Besides, the right of the Government to remit the tax if the employment has been *bona fide* is not in harmony with the theory and nature of a revenue measure but shows that the so-called tax is more in the nature of a penalty.

On the other hand, it has not only an obvious and reasonable, but a direct and necessary, relation solely to the enforcement of a police regulation of child labor within the States. It is not only plainly adapted to that end, but that is the only end to which it is at all adapted. That end is admittedly beyond the power of Congress, and has been so adjudged. Therefore the statute is unconstitutional for this reason.

The McCray Case, the Flint Stone Tracy Case, and the Doremus Case Distinguished.

The Government relies largely on the *McCray case* (195 U. S., 27). That case is clearly distinguishable from the one at bar. The tax on oleomargarine in that case was not a prohibitive tax and was not such a high tax as to have the reasonable effect of causing a cessation of the sale of the commodity rather than compliance with the incidental Federal regulation as to artificial coloring. On the other hand, the Government showed in that case that even after paying the ten-cents-a-pound tax on oleomargarine it still cost no more than butter and could be sold for even less than butter. See page 41, where it was shown:

> "The tax of ten cents per pound upon oleomargarine colored in imitation of butter is not prohibitive of its manufacture and sale. See vol. 9, Manufac

> tures, p. 3, Census Report 1900, for summary of facts respecting the relative cost and value of butter and oleomargarine. These facts show that the cost and value of oleomargarine, with the ten cent tax added, about equals the cost and value of butter. In the testimony of the dealers it is stated that good butter costs on an average two cents per pound more than colored oleomargarine in the Chicago Market."

It was there held, just as we contend here, that in construing the statute its necessary scope and effect should be considered. And the decision was based upon the finding by the court that the scope and effect of the statute was to raise revenue, although it might have an incidental regulatory effect. The holding that the acts were within the power of Congress was specifically based on the finding that their necessary scope and effect was to raise revenue. The court said:

> "Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power."

The attack was on that part of the statute which taxed artificially colored oleomargarine ten cents a pound, while ordinary uncolored oleomargarine was taxed only ¼ of a cent a pound. It was argued that this higher tax on colored oleomargarine was not adapted to raise revenue but simply to effect a police regulation as to coloring and was therefore

beyond the constitutional power of Congress; that is, the amount of the tax was the only indicia of an illegitimate end.

That this court correctly decided that the necessary scope and effect of this provision was to raise revenue from the tax on colored oleomargarine, and not simply to prohibit its sale and hence effect a mere police regulation, is conclusively shown by the Commissioner's Report above referred to, which on page 23, shows that for the year 1920 the revenue produced from that source was $1,194,720.17, while that from the tax on the uncolored product was only $930,343.25; and that for 1921 the revenue produced from the former was $921,[illegible]2.25 as compared with that from the latter of $655,[illegible]7.08.

In other words, not only is the oleomargarine tax a considerable revenue producer, but the very tax attacked in the *McCray case* as being not a tax, but a police regulation in the form of a tax and having no relation to raising revenue, has consistently raised more revenue than the admittedly valid ¼ of cent tax. These facts are the very reverse of the facts as to the child labor tax.

The *Flint Stone Tracy Case*, 220 U. S., 107, is also clearly distinguishable from the case at bar. In that case a tax on incomes of corporations was attacked on the theory that it was a tax on the privilege of using the corporate franchise, that this franchise was the grant of the State, and that therefore the Federal Government could not tax it. In the first place it was a pure tax, a revenue producer. It had only that end and effect and was a means plainly adapted to raising revenue and to no other end. It was admitted that the Federal Government had the right to tax corporate incomes. It was contended that this right was taken away because part of

the income came from the exercise of a franchise granted by the State. The specific point decided is stated by the Court on page 153:

> "The inquiry in this connection is: how far do the implied limitations upon the taxing power of the United States *over objects which would otherwise* be legitimate objects of Federal taxation, withdraw them from the reach of the Federal Government in raising revenue, because they are pursued under franchises which are the creation of the States?"

And the holding was:

> "We, therefore, reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges."

That case bears no analogy to the case at bar. The child-labor tax is not a tax on corporate income. It is a tax or penalty "on the employment of child labor," measured by 10 per cent of the net income of the offender.

We have already fully discussed the facts and the holdings of the *Doremus case* and have shown that the registration tax on dealers in narcotics in that act was held to be constitutional upon the specific ground that it bore a reasonable relation to the raising of revenue; that the dealers would pay the $1.00 tax and would not stop dealing; that it was a tax act and not a mere police regulation. To show that the court was correct in this decision, it is only necessary again to call attention to the Commissioner's report, which, on page 126, shows that for the fiscal year ending June 30, 1921, 295,127 registrants paid the tax. The stat-

ute had no effect to prevent dealing in narcotics. It raised revenue.

The Veazie Bank Case Distinguished.

The only case in which this Court has ever held valid an act of Congress which purported to be a tax statute, but which had no reasonable relation to the raising of revenue because its necessary effect would be to destroy the subject taxed, was the *Veazie Bank case*, 8 Wall., 533, and that statute was sustained, not under the taxing power of Congress, but under the power to establish and maintain the currency. It was held that although the effect of the tax on State bank notes was to prohibit them absolutely, still that was a means having a reasonable relation to the end of establishing the currency, and hence was constitutional, although as a tax statute it might have no relation to the raising of revenue.

To sustain this statute would tend to destroy the sovereignty of the States within their sphere and to destroy the dual system of government founded by the Constitution.

We have seen that this statute, which is defended only as a tax statute, has no reasonable relation to the raising of revenue. We have seen that the only thing to which it is reasonably related is the standardization of the ages and hours of labor of children in mines and factories within the States. We have seen that this is its necessary and only effect. We have seen that this effect is one to which the power of the Federal Government does not extend, and which Congress has no authority under the Constitution to accomplish.

We have seen, in the words of Marshall, that the exercise of a power beyond the constitutional grant to Congress, under the pretext or guise of a granted power, is not the law of the land and must be held unconstitutional and void by the court when such a case is properly presented to it.

The case is now presented. The question is squarely before the court: Can Congress, under the pretext of an exercise of the taxing power, directly usurp the power of police regulation within the States, which is beyond the constitutional authority of the Federal Government?

On the decision of this question depends the permanence of our dual system of government, the fundamental principle of the divided and independent sovereignty of the Nation and the States, which underlies our American system of government. Its decision is as important as the decision in *McCulloch v. Maryland*. If this statute is sustained, it follows necessarily that Congress has the arbitrary power to destroy any acknowledged exclusive and sovereign power of the States by simply giving to its regulation the form of a tax. If it is sustained, it follows that any decision of this Court endeavoring to establsh the boundary line of the nondelegated rights and powers of the States, upon which the Federal Government cannot encroach, such as the decision in the *Dagenhart case*, may be overruled and recalled by Congress by re-enacting the same statute in the form of a tax, although it would be utterly impossible for the Government to realize from it one cent of revenue.

The only answer offered is that we must have confidence in Congress that it will not use its taxing power, unlimited as the Government contends it to be, to encroach upon the

ghts of the States. We must assume that Congress has roper motives and must trust it not to do wrong.

It is not a question of confidence. It is a question of ower. If Congress has the power to invade the acknowlged exclusive rights of the States, the States exist as sovereign only at the mercy of Congress. They have only the ower to build up what Congress may pull down at pleasure. his, in the language of Pinkney, would leave to them only e power to provoke a smile, but nothing else.

The concluding words of the court in the *Dagenhart se* apply with even greater force in the present case:

> "The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, *and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.*"

No. 657.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

J. W. BAILEY, and J. W. BAILEY as Collector of Internal Revenue for the District of North Carolina,
Plaintiff-in-Error,

vs.

DREXEL FURNITURE COMPANY,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR DEFENDANT-IN-ERROR.

Stillman Appellate Printing Co.

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s Collector of Internal Rev-
nue for the District of North
arolina,
Plaintiff-in-Error,

vs.

REXEL FURNITURE COMPANY,
Defendant-in-Error.

No. 657.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
ATES FOR THE WESTERN DISTRICT OF NORTH
ROLINA.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of Case.

This is an appeal by the defendant in the court
low from a judgment of the District Court for
e Western District of North Carolina, rendered
ecember 10, 1921, holding unconstitutional and

void such part of the Federal Revenue Act of February, 1919, as imposes, or seeks to impose, a 10 per cent. tax, additional to all other taxes, on the profits arising from the sale or disposition of the products of mines, quarries, mills, canneries, workshops, factories or manufacturing establishments which, at any time during the year, shall have employed, or permitted to work, children under the age of fourteen years at all, children between the ages of fourteen and sixteen years for more than eight hours in any day, for more than six days in any week, or after the hour of 7 o'clock p. m., or before the hour of 6 o'clock a. m.

This suit was brought by a complaint filed on the eighth day of November, 1921 (Record, p. 1) by the Drexel Furniture Company, a manufacturing corporation resident in the Western District of North Carolina against a former Collector of Internal Revenue for the District of North Carolina to recover a tax assessed against it under the aforesaid provisions of the Revenue Act of 1919, which tax was paid under protest, and with notice of a purpose to sue to recover it back upon the ground that the law under which it was assessed and collected was unconstitutional.

The preliminary requirements of the statute with respect to bringing suit, such as filing claim for refund, etc., were fully met.

The District Court being of the opinion that the tax was illegally assessed and collected, because it was assessed and collected under an unconstitutional law, rendered judgment in favor of the plaintiff and against the defendant for the amount of the

tax so paid, and from this judgment the defendant has appealed.

The method adopted is in accordance with the recognized procedure, and presents for the consideration of this Court the validity of the statute: If the statute is unconstitutional the judgment should be affirmed.

Smietanka, Collector, vs. Indiana Steel Co., U. S. Sup. Ct., Oct. 24, 1921.

Statement of Question Involved.

The only question involved in this case is, therefore, whether the Act of Congress referred to is within the constitutional authority of Congress to enact.

The statute is Title XII of the Federal Revenue Act of 1918 (ratified, though, in February, 1919), which Revenue Act imposes large taxes on incomes and profits of individuals and corporations. The Act itself, in certainly most of its parts, is undeniably, as its title imports, "An Act to raise revenue." Title XII, Sec. 1200, imposes a tax of 10 per cent., additional to all other taxes imposed by the act, or any act, on the entire net profits received or accrued during each year, the first taxable year to begin April 25, 1919, from the sale or disposition of the product of any mine, quarry, mill, cannery, workshop, factory or manufacturing establishment that employs or permits the working of children during any portion of the taxable year otherwise than in accordance with the schedule permitted by said act, to wit: children under the age of fourteen at

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thall, or children between the ages of fourteen and orixteen, more than eight hours in any day or more than six days in any week, or after 7 o'clock p. m., by before 6 o'clock a. m. These taxes are to be, by the terms of the Act, collected upon reports made by the taxpayers in accordance with regulations to be issued by the Treasury Department.

The plaintiff's contention is that this Section 200 of Title XII of the Act of February, 1919, is beyond the powers delegated to Congress by the United States Constitution and is, therefore, void. The validity of the Act is challenged upon two principal grounds:

> (a) The statute, though forming a part of what is otherwise a revenue law, is not a taxing statute, but is an attempt to *regulate*—to impose the Congressional will as to what shall be permitted and what shall be forbidden—in a field in which Congress has no regulatory power, in violation of the Tenth Amendment of the Constitution which reserves to the states respectively, or to the people, powers not delegated to the United States.
>
> (b) The classification is arbitrary in that its basis is conduct preceding the origin of the thing selected as the measure of the tax, and not the nature and character of the thing itself; and also because its basis is a condition outside and beyond the sphere of congressional action, bearing unequally upon the members of the class, and thus is a violation of the rights of the individual under the Fifth Amendment,

and an invasion of the rights of the state reserved and withheld from congressional action by the Tenth Amendment.

ARGUMENT.

POINT I.

That this statute is unconstitutional is determined by the decision of this Court (Hammer vs. Dagenhart, 247 U. S., 251) declaring the Child Labor Law of 1916 unconstitutional.

In *Hammer vs. Dagenhart,* the Act considered prohibited the shipment in interstate or foreign commerce of any product of a mill situated in the United States, in which, at any time during the period of thirty days before the removal of the product, children under fourteen had been employed, or children between fourteen and sixteen had been employed more than eight hours in a day or more than six days in any week or between seven in the evening or six in the morning. That Act was held unconstitutional as exceeding the power of Congress and as invading the powers reserved to the states.

That case determined these propositions:

(1) That Congress may not under the guise of a granted power exercise an authority not entrusted to it by the Constitution.

(2) That when the purpose and effect of an Act of Congress necessarily appears from a consideration of the Act itself, and those sources open to the Court to consider, the Court will go behind the form to the substance, and if it appears that the legislative purpose may not be attained consistently with constitutional limitations, and is an exertion of power over a matter to which the federal authority does not extend, the Act will be declared void as transcending the granted power, and invading the reserved powers of the states.

(3) That Congress is without power to regulate the hours of labor of children in factories and mines within the states, that being a purely state function.

It would seem to us that this Court, in the *Dagenhart Case,* almost indicated prevision of the pending case, or a case like unto it, in a sentence used near the conclusion of the majority opinion:

"Thus the act (passed under the authority of the Commerce Clause of the Constitution) in a *two-fold* sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, *but also exerts a power as to a purely local matter to which the federal authority does not extend"* (p. 276, *italics ours*).

Notwithstanding this solemn decision by this Court, Congress in its enactment of the Federal Revenue Act of 1918, the consideration of which began soon after the decision by this Court in *Hammer vs. Dagenhart,* prescribed precisely the same minimum ages and the same working hours which it had prescribed in the statute just declared unconstitutional, and provided that any employer operating a mine, quarry, mill, cannery or factory, who saw fit to disregard the will of Congress in his employment of children, should, instead of having his goods shut out of interstate commerce, as the statute condemned in the *Dagenhart Case* had provided, be subjected to a so-called tax of 10% on all the profits of his business additional to all other taxes.

It needs no reference to the debates in Congress to ascertain the purpose of Congress in this enactment, and the direct effect of such enactment—if it is to have validity and effect at all. If recourse to these debates were necessary or desirable to show the purpose of Congress, such recourse shows the frankest and clearest expression of the congressional will and purpose:

It was declared in the course of the debate in the Senate (Senator Kenyon, Cong. Rec., Vol. 57, No. 16, p. 619) that it was right and proper that there should be found "some means of nullifying" the action of the Court in the *Dagenhart Case,* and the means adopted to nullify that decision is the present measure. "Here (in the *Dagenhart Case*) the Supreme Court decided that our attempt through the Interstate Commerce Clause of the Constitu-

tion to regulate this wrong was an unconstitutional way to get at it. Now we try another way, and pass that on to the Supreme Court for them to state whether or not it is constitutional legislation." (*Ibid,* p. 626). "I am frank to say that, of course, that will result in the non-employment of child labor" (Senator Lenroot, *Ibid,* p. 623). "The main purpose is to put a stop to what seems to be a very great evil, and one that ought to be in some way put a stop to" (Senator Lodge, *Ibid,* p. 619). "I have heard no one suggest any revenue would be raised by it * * * My individual judgment is no revenue will be raised by it" (Senator Simmons, Chairman Finance Committee, *Ibid,* p. 620).

It does not consist with the dignity that should characterize arguments in this Court to discuss, as if it were an uncertain thing, the purpose and effect of this statute. Of course it is not a revenue statute, and of course it is an attempt to impose upon all the citizens in all the states the congressional will as to their conduct in the operation of their manufacturing, mining and quarrying enterprises.

There was no motion for a rehearing of the *Dagenhart Case,* and the dissenting opinion, not less than the prevailing opinion, showed thorough consideration by this Court of every question involved. We are tempted to conclude this argument just here, for to our minds, the *ratio decidendi* of the *Dagenhart Case,* as well as the words of the prevailing opinion, must give it application not only to the grant of power to regulate commerce,

but to all the grants of power made by the Constitution to Congress, including the power to tax—unless an exercise by Congress of the power to tax is free from scrutiny and review by the Court, while an exercise by Congress of any of its other powers is subject to such scrutiny and review; unless the spirit and purpose of the Constitution are to be considered when power is exercised under the other grants, and disregarded only when the asserted source of power is the power to tax; unless covert legislation, that usurps state functions to the point of annihilation, is permissible through an exercise of the power to tax, and not through an exercise of any of the other grants of power; unless, indeed, the Tenth Amendment qualifies and limits only a part, and not all, of the grants of power, so that our dual form of government is immune from destruction only so long as Congress sees fit to refrain from the use of the power to tax.

POINT II.

The statute here considered is precisely condemned by the principles announced by this Court in numerous cases, including cases in which taxing statutes have been upheld.

In *McCulloch vs. Maryland* (4 Wheat., 316) this Court, through Chief Justice Marshall, rendered its famous decision upholding the right of Congress to charter a national bank, and forbidding a state to embarrass the operations of such bank,

but (at page 423) the Court used this solemn and often quoted language:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

It is to be noted that this language of Chief Justice Marshall is express in its application to the *federal authority,* and does not refer at all to the state authority, and this notwithstanding the fact that the decision of the Court struck down a state, and not a federal, statute. This language was a part of the gist of the decision, and not in any way an *obiter,* because one of the questions most seriously argued and considered was the right of Congress to charter a national bank, and the foregoing language was used in the course of the decision of this major premise that was directly involved in the case.

In *Veazie Bank vs. Fenno* (8 Wall., 533), the Court sustained, under circumstances to be hereinafter discussed, an Act of Congress levying a tax on the issue of currency by state banks, but in so doing this Court (at page 548) announced this principle—and it is to be noted that it was so announced in a case having solely to do with the power of taxation:

> "There are indeed certain virtual limitations (on the power of taxation) arising from the principles of the Constitution itself. *It would undoubtedly be an abuse of the power* if so exercised as to impair the separate existence and independent self-government of the states, or if exercised for ends inconsistent with *the limited grants of power in the Constitution.*" (*Italics ours.*)

In the recent *Doremus Case* (249 U. S., 86), this Court upheld, as having relation to an admittedly valid tax imposed by section 1 of a congressional enactment, regulations and restrictions affecting the conduct of the traffic so taxed, which regulations and restrictions were set out in section 2 of the enactment. But the Court said (at page 93):

> "Of course Congress may not in the exercise of federal power exert authority wholly reserved to the states. Many decisions of this Court have so declared."

Judge Cooley, in his thoughtful and authoritative treatise on Taxation, has recognized the general limitations that in any constitutional country must apply to the power of the sovereign to levy and collect taxes, and the special limitations that under our system of government exist as to the power of the sovereign, whether it be the sovereign state or the sovereign federal government:

> "Great as is the power of any sovereign to levy and collect taxes from its citizens, that

> power in a constitutional country has very distinct and positive limitations. Some of these inhere in its very language and exist whether declared or not declared in the written constitution; * * * other limitations spring from the peculiar form of our government and from the relation of the states to the national authorities." (*Cooley on Taxation* [3rd ed.], 82.)

If any statute is ever to fall under the condemnation of the foregoing judicial utterances, it is the statute now being considered. As impairing the "independent self-government of the states," as exerting authority "wholly reserved to the states," as exercised "for ends inconsistent with the limited grants of powers in the Constitution," —it certainly goes beyond anything yet attempted, and as far as anything that can be imagined. If sustained as a tax, it must be as a privilege tax, and yet it does not purport to bear any relation in amount to the extent that the privilege is enjoyed. It is not a tax on the products of child labor, but it is a tax on the employing of children under circumstances not approved by Congress, and the amount to be paid for disobedience to the will of Congress is arrived at precisely as the criminal judge arrives at the fine to be paid by a convicted criminal: The criminal judge does not ask what profit the criminal has made by his crime, but he asks what amount of fine will constitute a real and deterring penalty, and looks to the financial condition generally of the convicted criminal. So this statute imposes a tax of ten per cent. on the total

profits, whether from the employment of children or the employment of adults—whether from the investment of large capital, or skill or good fortune in management—that the offending employer has made during the year.

The employment of children, under conditions and circumstances condemned by the competent legislative authority, has never in the history of the world been treated as a privilege, but has always been treated as a crime. Whatever may be said as to the hours and circumstances of employment of adults, no one for many years has doubted that the regulation of minimum ages for children's employment, and maximum hours for a child's day labor, is within the police power of the states. The Government, in its brief in the *Dagenhart Case*, interestingly traced the development of child labor laws in this country from 1813, when Connecticut enacted a regulatory statute. That brief, with entire accuracy, stated that the conviction has grown up throughout this country "that the employment of child labor was morally repugnant and socially unwise."

This statute is a criminal statute, under the general title "A Bill to Raise Revenue." It is this, not only though, but much worse: It is an attempt to make regulations, in accordance with congressional wishes, and applicable to the whole country, in a matter so influenced by local surroundings as to be properly regulated only by local legislatures. To steal, to whip one's wife, is a definite evil everywhere. For Congress to attempt to prevent either by a prohibitory tax, would be, of

course, a grotesque invasion of the powers reserved to the states. But when Congress attempts to regulate child labor it is making an infinitely more vicious invasion of the police power which ought to continue to reside only in the states: Child labor is an evil, it is true, but whether it is evil for a child of a particular age to be permitted to work a particular number of hours, and whether on farms and not in factories, or in mines and not as messenger boys in cities—these are of the very class of questions that need, in order to be answered wisely, to be answered by legislatures who enact laws for communities smaller than the whole United States.

The states of the United States, including the state of North Carolina, have recognized the evil of unrestricted child labor, and have legislated with respect to it, each in accordance with its own peculiar conditions, having regard to climate, distribution of wealth, social conditions, and other such considerations. New York has statutes that relate to the employment of children in sweatshops, but sweatshops are unknown in North Carolina. Georgia has taken into account that the father is naturally and normally the principal producer of material support for the family, and permits the son of a widow to go to work at an earlier age, and work for longer hours, than is permitted to the son whose father is still living. Most of the state legislatures have seemed to believe, either that outdoor work is more nearly harmless for a young boy than factory work, or that farmers need peculiarly the services of

their sons, and have not attempted to regulate either the minimum age or the maximum hours so far as farm work is concerned.

Not only have the states their various statutes relating to child labor, but in many of them there have been progressive steps to protect the health, vigor and safety of the coming generation. Of course these steps have, in a general way, been coincident with the progress of the states in wealth. Maybe it would be ideal (and maybe it would not be) if boys did no productive work at all, but devoted their whole time, until they reach the age of twenty-one, to physical, mental and moral preparation for the life that lies before them. But it may not be denied that a boy should not live up to this ideal if doing so involves the starvation of his mother and sisters. In other words, and without elaboration, whatever may be said of the evils of child labor, and the rules and regulations proper for the abolition or amelioration of the evil, the making of these rules and regulations constitutes a part of the police power properly exercisable by the local governments; and that what might be entirely wise and humane in a rich community, of cold climate, where weather conditions make ventilation difficult, inhabited chiefly by Anglo-Saxons, would be unwise in a community where poverty still stalks, where weather conditions may make possible constant fresh air even in a factory, and where the population is, in whole or in large part, of some other and earlier maturing race than the Anglo-Saxon.

In *George vs. Bailey* (274 Fed., 639) the same able District Judge (Judge Boyd of the Western

District of North Carolina) who was affirmed by this Court in his opinion that the child labor law passed by Congress, in the assumed exercise of its commerce power, was unconstitutional, held that this child labor law, though a so-called taxing statute, is likewise unconstitutional, and in his opinion he refers, with absolute justice, to the most recently enacted and present-applying child labor criminal statute of North Carolina (Public Laws of North Carolina, Session of 1919, Chapter 100, page 274):

> "The Child Labor Law of North Carolina is made a feature of the public school system of the state, thus concentrating the means for the promotion of the mental and the physical welfare of children under one harmonious plan, to be carried out by the agencies provided for in the act, the purposes of which are to foster the health and physical development of children and at the same time train their minds for future usefulness, and its provisions appear ample to accomplish these ends. By comparing the federal and state statutes it will be readily seen that the latter affords as much protection to the health and physical condition of children as the former, and, as stated before, the state act co-ordinates its purpose to promote physical welfare, with provisions for mental training, and, further, an important provision in the state statute is the punishment, provided for its violation; instead of undertaking, as the federal act, to make the income of an establishment using child labor il-

> legally, the subject of taxation, it denounces as a criminal offense the violation of its provisions and subjects the offender to a fine or imprisonment, or both, at the discretion of the court" (p. 643).

This statute is a criminal statute—a police regulation—and not a taxing statute, without respect to whether the employment of children under conditions contrary to the schedule prescribed by Congress is induced by the cupidity of the employer, or some other motive. In the brief for the Government in *Hammer vs. Dagenhart* (page 24), it is argued that child labor is really not cheaper than adult labor, and that there is therefore no economic advantage in the employment of children. If it be assumed that this argument is unsound, and that there is some economic advantage in the employment of child labor contrary to the will of Congress, such assumption by no means validates this statute as a tax statute. Many of the police regulations and prohibitions that states may properly pass, are intended to prevent encroachments upon the health, well being and good order of society, induced by the cupidity—the desire for gain—of the offenders.

POINT III.

It is not true that the taxing power of Congress is limited only by the limitations expressly stated by the Constitution to be applicable to the power to tax, to-wit: that exports may not be taxed, and that direct taxes must be apportioned, and excise taxes uniform. This Court has expressly and repeatedly recognized other limitations.

There are, undoubtedly, single sentences in opinions delivered by this Court, contradictory to the principles announced in those deliberate expressions of the Court quoted in the next preceding point, which would seem to justify the argument that the prohibition of the power to tax exports, and the provisions for uniformity as to excise taxes, and apportionment of direct taxes, constitute the only limitations on this federal power.

So recently, though, as June, 1920, this Court in *Evans vs. Gore* (253 U. S., 245) held that the collection of an income tax from a federal judge, under a congressional enactment passed after his term of office began, would be unconstitutional, because inconsistent with Article III of the Constitution, which provides that the compensation of a federal judge shall not be diminished during his continuance in office. That decision was an express recognition by this Court, not by way of argument or *obiter,* but by definite and reasoned decision, that there is a limitation on the power of Congress to tax other than the specific limitations hereinbefore referred to; that when the congres-

sional enactment, or its proposed enforcement, runs counter to a definite limitation contained in any article of the Constitution, the congressional enactment is to that extent void.

Evans vs. Gore, it is true, dealt with what this Court conceived to be inconsistency between the congressional enactment and the express constitutional limitation which forbids the reduction of the compensation of a federal judge, but in *Collector vs. Day* (11 Wall., 113) this Court, in an opinion, the whole of which should be read carefully by those who conceive that the states should lose all consideration in these days of teeming nationalism, held that a federal income tax may not be collected from state judges, not because there is any constitutional provision against the diminution during their term of office of the compensation of state judges, but because of the *implied limitation on the federal power to tax, inherent in the very warp and woof of this federated government, which recognizes a dual sovereignty—on the one hand a federal authority supreme in its sphere, and on the other hand sovereign states supreme in their sphere.*

The validity and controlling authority of *Collector vs. Day* need not now be dwelt on to this Court, because this Court, so recently as in *Evans vs. Gore* gave consideration to *Collector vs. Day*, and the later cases which applied its doctrine, to-wit: the *Income Tax Case* and *United States vs. Railroad Company*, which respectively held that Congress was without power to impose an income tax in respect of interest received on state bonds, and on municipal revenues received by a state constituted municipality,

"True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize and sustain, is well settled. In *Collector vs. Day*, 11 Wall., 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, 585, 601, 652, 653, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in *United States vs. Railroad Co.*, 17 Wall., 322, there was a like holding as to municipal revenues derived by the city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the states within their own spheres." (*Evans vs. Gore*, p. 255.)

When one reads the opinion of this Court in the *Dagenhart Case* and in connection with it the doctrine of the earlier cases, so recently affirmed by this Court in *Evans vs. Gore*, it is hard to conceive any course of reasoning that will sustain the validity of this statute. The cases of *Collector vs. Day, Pollock vs. Farmers' Loan & Trust Co.* and *United States vs. Railroad Company*, it is true, had to do with the *functioning* of the sovereign states, but of what avail is it for a state to function *if its regulatory power has been usurped by Congress?*

POINT IV.

Considering the sovereign powers of the federal government and of the states respectively in their several spheres, this Court has condemned this statute in principle in its condemnation of certain taxing statutes of the states.

In *Western Union Telegraph Co. vs. Kansas* (216 U. S., 1), this Court considered a statute of the state of Kansas that required telegraph companies, *as a condition precedent to their right to engage in local business,* to pay into the state school fund a given percentage of their authorized capital, which represented all of their business and property everywhere. It is to be noted that this imposition of a tax was simply a condition precedent to the right of the Telegraph Company to engage in local business, and that the Telegraph Company might escape that liability by simply refraining from the conduct of local business—it was not a part of the statute to attempt to directly put any burden on interstate commerce. The validity of the tax was asserted in this Court by the argument that the matter of the right of a corporation to engage in local business in the state was dependent upon the option of the state itself, and conditioned upon the assent of the state, and, that, therefore, the state might impose such conditions as it saw fit. This argument was not to be regarded lightly, because this Court as early as *Paul vs. Virginia* (8 Wallace, 168), had said of the rights of states

with respect to the local business of foreign corporations:

> "They (the states) may exclude the foreign corporation entirely; they may restrict its business in particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best protect the public interest. The whole matter rests in their discretion". (p. 181.)

And this Court, affirming *Paul vs. Virginia,* in a later case, had said:

> "The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature to be exercised in its good pleasure, it may be accompanied with any such condition as the legislature may deem most suitable to the public interests and policy. * * * As to a foreign corporation—and all corporations in states other than the state of its incorporation are deemed to be foreign corporations—it can claim a right to do business in another state to any extent only subject to the conditions imposed by its laws". (*Mining Co. vs. New York,* 143 U. S., 305, 314.)

The argument in favor of the validity of the tax seemed to be strong if the form of the statute was to be regarded, because it was not a tax directly

on the company's interstate business, or its privilege to engage in interstate commerce, or its property outside of the state, but the statute referred to the charge made against the corporation as a "fee" for the privilege of doing local business—a condition upon which the consent of the state to do local business was predicated. This Court however held the law invalid:

> "The statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent. of its authorized capital representing all its business and property everywhere, is a burden on the company's interstate commerce, and its privilege to engage in that commerce, in that it makes both such commerce conducted by the company and its property outside of the state contribute to the support of the state schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent. of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance". (216 U. S., 1, 37.).

This decision was by a divided Court, four Justices joining in a vigorous dissent. Later cases, reannouncing the principle, though, have followed, and in *International Paper Co. vs. Massachusetts* (246 U. S., 135) this doctrine is reviewed and definitely adopted by a unanimous Court.

It is said that the argument drawn from these decisions is not valid in the case at bar because the nation is superior to the state by virtue of that clause in the Constitution which provides that the Constitution itself and the laws of the United States made in pursuance thereof constitute the supreme law of the land; and that while the state, though it adopts a form of legislation that makes the legislation seem valid under its reserved powers, must not encroach in fact upon the power delegated to Congress, it is, nevertheless, competent for Congress under a power delegated to it to override in fact the power reserved to the state. We conceive that this general statement of the supremacy of the nation over the state is not warranted, but is wholly vicious. It is the Constitution and the federal statutes enacted *in accordance with the Constitution* that constitute the supreme law of the land, and federal statutes enacted otherwise than in accordance with the Constitution are not only not the supreme law of the land but not law at all. Under our Constitution the nation and the states are not to be weighed in the balance to ascertain any general supremacy —the nation is supreme in the exercise of the powers delegated to it, and the states are supreme in the exercise of the powers reserved to them.

In 1870 *Collector vs. Day* (*supra*) came to this Court involving the question whether an income tax levied by Congress on every profession, trade, employment or vocation could be applied to the salary of a judicial officer of the state. It had already been decided by this Court, following the case of *McCulloch vs. Maryland,* that it was not

competent for the legislature of a state to levy a tax upon the salary of an officer of the United States (*Dobbin vs. The Commissioners of Erie County,* 16 Peters, 435). The argument was made that the national government was supreme, but this Court repudiated that argument, and held the tax invalid. It said:

> "The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states * * *. The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff-in-error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax a salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws and which concerns the exercise of a right reserved to the states". (pp. 124, 126.)

The attributes to sovereignty that belong to the states in matter of taxation have been declared by this Court in numerous cases to be of the kind, character and quality that belong to the federal government. In *Bell's Gap Railroad Co. vs. Pennsylvania* (134 U. S., 232), this Court said, with respect to a state tax:

> "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations and those of a like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature or the people of the state in framing their constitution."

The foregoing quotation, it is to be noted further, as showing the analogy between the federal and state taxing power, was used by Mr. Justice

Day in the unanimous opinion of this Court in sustaining the corporation excise tax imposed by Congress in 1909 (*Flint vs. Stone Tracy Co.*, 220 U. S., 107, 160).

POINT V.

There are no words of the Constitution, nor admitted validity of analogous congressional tax enactment, nor decision of this Court, that works the validity of this statute, though it was enacted in the guise of a revenue bill and ostensibly under the power of Congress to collect taxes.

In this Point an effort will be made to consider, separately, the arguments and the precedents that are ordinarily advanced and suggested as making for the validity of this, or somewhat similar statutes. The argument now advanced is without reference or present access to the brief of the Solicitor General in this case.

POINT V-a.

THE POWER OF CONGRESS IS "TO LAY AND COLLECT TAXES, DUTIES, IMPOSTS AND EXCISES," AND THERE IS NO EXPRESSLY GIVEN POWER TO PROVIDE, UNDER COLOR OF A TAX LAW, FOR THE "GENERAL WELFARE OF THE UNITED STATES."

The words of the Eighth Section of the Constitution of the United States are:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The suggestion has been made that, somehow, in these words, there is given a power, presumably not in the express grants of power otherwise contained in the Constitution, to legislate for the "general welfare." It is to us inconceivable that these words "to pay the debts and provide for the common defense and general welfare of the United States" refer to anything except the use that the taxes, duties, imposts and excises may be put to when they shall have been laid and collected—the uses, any one of which will justify the raising of revenue.

In the preamble to the Constitution of the United States, it is declared as a part of the purpose of the people in thus forming the United States of America and ordaining and establishing the Constitution, to "promote the general welfare," and the authority given by the first clause of the Eighth Section is a power to lay and collect taxes, duties, imposts and excises which, when collected, may provide among other things for the general welfare of the United States. Is it conceivable that anything else was in the minds of the framers of the Constitution? Is it conceivable that these words were intended to give the right to Congress to promote what it conceives to be the general wel-

fare, or to provide for the general welfare, in ways and to a degree not contemplated by other grants of powers, and thereafter expressly withheld, because not so delegated, by the Tenth Amendment?

We never have seen a judicial decision that presumed to place the validity of a so-called taxing statute on this suggestion. We are unable to prolong the argument because such argument involves the simple attempt to arrive at the meaning of a sentence, and that meaning seems to us obvious.

POINT V-b.

The Fact that Protective Tariffs Have Been Levied and Have Always Been Assumed to be Valid is in no Way Controlling or Influential in the Present Case.

It is true undoubtedly that Congress has enacted many tariff rates on the importation of articles into the United States, when at least a part of its motive in arriving at such rates was to discourage such importation. It is frequently suggested that this analogy requires the Courts to sustain any tax imposed in the ostensible exercise of the taxing power, even though it is plainly apparent that revenue is not sought.

This, though, leaves out of consideration the fact that Congress does have the undoubted power to exclude importations altogether, and since the greater includes the less, it must have the power to place such conditions upon the importations as it sees fit. Embargo acts are not so common as tariff

acts, but they have existed, and to an extent do now exist, and their constitutionality may not be denied. The power existing, then, in Congress, to impose restrictions or conditions on importations from foreign countries, it makes no practical difference whether Congress imposes such conditions in a statute labeled "An Act to raise revenue," or imposes them, more frankly, in a statute labeled "An Act to impose restrictions on imports."

This Court may not invalidate the exercise of an admitted congressional power simply because Congress has incorrectly labeled or incorrectly entitled the instrument by which it sees fit to exercise that power. This is but the corollary of the doctrine that this Court may not validate the attempted exercise by Congress of a power which it does not possess simply because Congress has incorrectly labeled the instrument.

> *"The direct and necessary result of the statute must be taken into consideration in deciding as to its validity* even if that result is not in so many words either enacted or distinctly provided for." (*Collins vs. New Hampshire,* 171 U. S., 30, 33. *Italics ours.*)

Chief Justice White, when a member of the United States Senate in 1892, completely and with characteristic vigor stated the distinction, in an argument, the whole of which is relevant to this question now under discussion: Having otherwise pointed out the distinction between import duties and internal revenue taxes, he said (Cong. Rec., Vol. 33, p. 6517):

> "In other words, I contend that where power to destroy exists, the use of a wrong instrumentality to do the destruction may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is not alone an abuse of the instrumentality, but an usurpation of the power itself. Now, the usurpation of power by Congress not vested by the Constitution in Congress is unconstitutional."

If Congress had the power to regulate the employment of children in the various states, then one might wonder at its accomplishing such regulation by a taxing statute, instead of by a statute of direct regulation, but this Court could not declare such so-called taxing statute void. It is precisely because this is a regulation beyond the power of Congress that this statute is void, and not because it is labeled a revenue bill.

POINT V-c

THE DECISIONS OF THIS COURT THAT SUSTAIN REVENUE ACTS OF CONGRESS WHICH INCIDENTALLY AFFECT CONDUCT DIRECTLY TO BE REGULATED ONLY BY THE STATES, DO NOT CONSTITUTE AUTHORITIES FOR SUSTAINING THIS STATUTE.

Congress could not possibly levy internal excise taxes, whether collected by stamps or otherwise,

without some incidental interference with the conduct of citizens in those fields which are directly regulatable only by the states. If this Court had held, therefore, that, on that account, federal tax statutes were invalid, it is hard to conceive how the federal government could have had any revenue except from imports until after the passage of the Income Tax Amendment to the Constitution. It is not remarkable, therefore, that this Court has, so far as we have found, without dissent, sustained federal revenue statutes that were in truth revenue statutes, and that were attacked as encroaching upon the power of the states, in influencing the conduct of its citizens.

The first of these cases were the *License Cases* (5 Wall., 462), in which it was contended that a federal statute imposing a tax on liquor dealers, undoubtedly for revenue purposes, was unconstitutional, especially in states which prohibited the sale of liquor. In view of the fact that the tax law itself contained the provision that the payment of the tax should not be taken as a license, it is hard to see how the fact that the liquor dealers who contested the tax were from the states which prohibited the sale of the liquor, was relevant to the discussion. This Court unanimously held that the tax was valid, notwithstanding that its imposition and collection might influence citizens to sell more or less liquor than they otherwise would have done.

In *Nicol vs. Ames* (173 U. S., 509), there was considered a real revenue act, having no regulatory purpose, but only a tax-collecting purpose, which imposed taxes on certain sales made at exchanges.

This Court sustained the classification as being a reasonable one, and sustained the tax as being indirect and not direct. Its effect on the conduct of citizens regulatable by state authority was merely incidental. This decision, too, was by an unanimous court.

In *Flint vs. Stone Tracy Co.* (220 U. S., 107), this Court considered the validity of the corporation excise tax of 1909, which, plainly for revenue purposes, levied a tax on incomes of persons associated together and enjoying the franchises of corporations, and laid no such tax on individuals conducting business alone, or in association with others in copartnership. This Court again unanimously sustained the law, carefully arguing the privilege value of the corporate formation.

> "The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general ab-

> sense of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals". (pp. 161, 162).

We have no quarrel with these cases just hereinbefore discussed, nor with *Knowlton vs. Moore* (178 U. S., 41), nor *Spreckles Sugar Refining Co. vs. McClain* (192 U. S., 397), nor with *Springer vs. United States* (102 U. S., 586). We freely concede, with all the intendments and implications reasonably arising out of such concession, that a federal excise tax levied and collected for the purpose and with the result of raising funds for the federal government, is valid, nowithstanding its incidental influence on the conduct of citizens in matters directly regulatable only by the states.

POINT V-d.

THE THREE CASES DECIDED BY THIS COURT NOT CLEARLY IN THE CLASS JUST HEREINBEFORE DISCUSSED—THE VEAZIE BANK CASE, THE DOREMUS CASE AND THE OLEOMARGARINE CASE—ARE DISTINGUISHABLE FROM THE CASE AT BAR, AND ARE NOT AUTHORITIES FOR HOLDING THIS STATUTE CONSTITUTIONAL.

VEAZIE BANK CASE.

The *Veazie Bank Case* (8 Wall., 533) sustained the constitutionality of an act of Congress that imposed a 10% tax on the issues of currency notes of any state bank. The points of argument made against the validity of the tax, as reported, were (1) that the tax in question was a direct tax and had not been apportioned; (2) that the act imposing the tax impaired a franchise granted by the state. It would be uncandid for us to say that there are no expressions in the opinion of Chief Justice Chase, which, if they had been necessary to the decision in the case, would not have been embarrassing to us in this argument. It is, in our judgment, though, entirely inaccurate to say that the decision itself is authoritative on the question here involved. In length, most of the opinion of the Court is a discussion of the question as to whether the tax was direct so that it should have been apportioned, or indirect, and the decision of the Court is that it was an indirect tax and, therefore, did not have to be apportioned. The stress of the dissenting

opinion is that the tax, being an excise levied on the enjoyment of a franchise granted by the state, was unconstitutional, whether levied for revenue purposes or otherwise. If the dissenting opinion had been the prevailing opinion of the Court, the corporation excise tax could not have been sustained. The only discussion in the prevailing opinion of the Court in any respect relevant to the question involved in this case, is contained in a dozen lines (page 548) in which Chief Justice Chase states, in answer to the insistence of counsel—evidently oral, and not reported in the points of counsel shown in the report of the case—that the tax levied was so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and not to raise revenue, that:

> "The first answer to this (that insistence) is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. * * * So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

After these dozen lines, the opinion proceeds to the demonstration that, without respect to that question, this particular tax, or regulation, if you please, is vindicated because Congress under its power to provide a circulating medium, has the undoubted power to restrain by suitable enactments

the circulation as money of any notes not issued under its own authority. Except for the short and tentative words of the opinion just hereinbefore fairly reproduced, the *Veazie Bank Case* illustrates precisely the doctrine under which protective tariff laws are valid, to wit: that Congress, having the power to regulate, may use the instrumentality of taxation to accomplish such regulation. The *decision* in the *Veazie Bank Case*—as distinguished from some of the unnecessary words of the Chief Justice—is authority only for the proposition not here contested, that where the power to regulate exists, the Court will not deny the validity of any statute that accomplishes such regulation.

The Doremus Case.

The *Doremus Case* (249 U. S., 86) did not involve at all the validity of a tax *levy*. An Act of Congress, passed in 1914, by section 1 imposed a tax on every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of certain narcotic drugs. Of course there was no attack on the validity of that imposition. Section 2 provided certain regulations as to the sale of these narcotics, requiring dealers to require certain prescriptions on certain order blanks. The question before the Court was whether these regulations thus set out in section 2 had any reasonable relation to the collection of the tax imposed by section 1, and this Court (four justices dissenting) held that these

regulations in section 2 did have reasonable relation to the collection of the tax imposed by section 1, as tending—

> "to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. * * * We cannot agree with the contention that the provisions of section 2 controlling the disposition of these drugs in the ways prescribed can have nothing to do with the facilities of collecting revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes" (pages 94, 95).

We respectfully and confidently submit that, fairly considered, there is not in this *Doremus Case* authority for holding the present statute constitutional, and this contention does not have as its cause or condition that four of the nine justices then constituting the Court dissented on the ground that the regulations provided in section 2 went beyond the constitutional power of Congress. It is to be remembered, too, that it was in the prevailing opinion of the Court in the *Doremus Case* that the principle was distinctly stated as already quoted, that Congress "may not in the exercise of federal power exert authority wholly reserved to the states".

THE OLEOMARGARINE CASE.

McCray vs. United States (195 U. S., 27), decided in 1904, is the case most frequently referred to by those who conceive that the decisions of this Court confirm the right of Congress to regulate, by the use of the taxing power, all activities of citizens, without reference to the police power of the states.

A careful and frank consideration, not necessarily of particular words, but of the reasons for the decision of that case, and of the circumstances of the case generally, is certainly not irrelevant: Congress had passed a statute, the effect of which was to levy a tax on oleomargarine, free from artificial coloration that would make it look like butter, at the rate of ¼ of a cent per pound, and on oleomargarine, artificially colored to look like butter, a tax of 10 cents per pound. The Court decided, first, that ordinarily, a tax imposed on the production of an article that is consumed is valid—tobacco taxes, sugar taxes, and other such taxes had been freely imposed and collected. The question of classification was then reached, and it was ascertained and declared that a classification whereunder one rate of tax was imposed upon colored oleomargarine, and another rate on uncolored oleomargarine, was not arbitrary and fanciful, but had a legitimate basis, considering the prices and profits at which the two different classes of articles could be sold. It would seem to us that this differential, or classification, is justified, just as was afterwards justified the differential or classification, as between wholesade and retail dealers for

purposes of taxation under a state statute, as declared in *Cook vs. Marshall County* (196 U. S., 261). The Court then came to the contention, made by the oleomargarine makers, that the statute was not intended to raise revenue, but was intended to prevent the sale of artificially colored oleomargarine, and that on that account this Court should hold that the statute was beyond the power of Congress. This contention, of course, involved going clean beyond what appeared on the face of the statute,—a tax of twice ten cents a pound on tobacco, is not prohibitive nor regulatory but only revenue-producing. The contention involved necessarily a consideration of facts of costs, selling values and competitive conditions in the business. Even going thus outside of the record, the oleomargarine makers by no means established in any admitted or conclusive way that this tax was, or was intended to be, prohibitive. To quote from the reported argument of the Solicitor-General, (page 41):

> "The tax of ten cents per pound upon oleomargarine colored in imitation of butter is not prohibitive of its manufacture and sale. See vol. 9, Manufactures, p. 3, Census Report, 1900, for summary of facts respecting the relative cost and value of butter and of oleomargarine. These facts show that the cost and value of oleomargarine, with the ten cent tax added, about equals the cost and value of butter."

That this argument by the Solicitor-General was sound is conclusively shown by subsequent results: For the year 1920, the revenue produced by the ten cent tax on colored oleomargarine was $1,194,720.17, and in 1921 was $921,192.25 (Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ending June 30, 1921, p. 23).

The statute was held valid by this Court, three Justices dissenting.

In the instant statute we do not have an attack on the validity of a statute dependent solely on the high rate of the tax imposed. We have no contention whose validity depends on bringing to the attention of the Court, otherwise than from the statute itself, facts to show that the statute is only regulatory, and not in truth a tax statute. In the present case we have no tax at all on a product and its volume of production or sale, but a simple congressional declaration that if an employer, for a single day, or with respect to a single child, violates the schedule showing the will of Congress as to the employment of children, he shall pay ten per cent. of the whole year's profits. The fiscal results of this statute, contrast also with those that followed the imposition of the oleomargarine tax: Many employers believe that this statute is altogether unconstitutional and invalid, and it has sometimes been embarrassing to general organization and working conditions for factories to employ boys between fourteen years of age and sixteen years of age at all, and not at sometime permit them to work more than eight hours per day. In

this way, in the completed fiscal years of the operation of the law—a period of a little more than two years, or from April 30, 1919, to June 30, 1921—the Internal Revenue Department, with an average staff of fifty employees for the enforcement of the child labor law, has collected the gross sum of $26,603.87 (Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ending June 30, 1921, p. 16). If it be assumed that the members of the staff receive annual salaries of $2,000, this collection of $26,603.87 has been at an expense of over $200,000.

POINT VI.

A general reconsideration of the elementary and basic principles upon which this government rests forces the conclusion that this statute is unconstitutional and invalid.

Cases such as this that involve great constitutional questions are not to be solved by an attempt to write out a legal formula that reconciles all preceding cases that have been decided. There inevitably is involved in the decision of such cases the quality of statesmanship as well as the qualities of a lawyer. Throughout the history of this Court, as of this country, there have appeared, from time to time, trends or tendencies of statutes and of decisions, one serving as a precedent for a next further step in the same direction,—and then there has come before the Court a case which, if decided in accordance with the theretofore existing trend or

tendency, would constitute, to quote a memorable phrase recently uttered by a member of this Court, the "step from the deck to the sea." *Hammer vs. Dagenhart* (*supra*) was one of those cases:

In the judgment of this Court the statute there condemned had gone beyond the line which under our Constitution must mark the limit to the theretofore increasing tendency and power of Congress to regulate everything and everybody under the Interstate Commerce Clause of the Constitution. *Western Union Telegraph Co. vs. Kansas* (*supra*), discussed in Point IV hereinbefore (pages 21 to 23) marked another turning point—this Court realized that the previous decisions made by this Court in recognition of the powers of the states to prevent foreign corporations from doing business in them respectively, and to adjust their systems of local taxation as they, the separate states, see fit, were leading to a *practical* condition that was intolerable. In the attempt by the Government to sustain this statute by extending, even by an inch, the doctrines asserted by it to be laid down in the *McCray Case*, the *Doremus Case* and the *Veazie Bank Case*, we are brought to a like practical situation.

What are the general and elementary principles that must be taken into account?

1. This is a federal government with a written constitution, and if any statute, federal or state, is not in accordance with that written constitution, it is the duty of this Court to declare such statute

void. That this is the law has not been judicially doubted since *Marbury vs. Madison.*

> "If written constitutions are to be regarded as of value, the duty of the Court is plain to uphold the constitution, although in so doing the legislative enactment falls. The reasoning in support of this was, in the early history of this Court, forcibly declared by Chief Justice Marshall in *Marbury vs. Madison* (1 Cranch, 137, 177), and nothing can be said to the strength of his reasoning." *Fairbank vs. United States* (181 U. S., 283, 285).

2. This is a federated government—"an indissoluble union of indestructible states"—and no state legislation is valid that encroaches upon the powers delegated to the union, and no federal legislation is valid that encroaches upon the powers reserved to the states. Inevitably the efficient exercise of a federal power may incidentally diminish, or otherwise affect, a state power; but if the encroachment be direct, and not incidental, then the federal statute is void.

> "In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County vs. Oregon,* 7 Wall., 71, 76. The power of the states to regulate their purely internal affairs by such means as seem wise to the local

authority is inherent, and has never been surrendered to the national government" (*Hammer vs. Dagenhart, supra.,* p. 75).

"Both the states and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of Confederate government, which acted with powers, greatly restricted, only upon the states. But in many articles of the Constitution the necessary existence of the states, and within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved" (*Lane County vs. Oregon,* 7 Wall., 71, 76).

"If the Constitution in its grants of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety." (*Fairbank vs. United States,* 181 U. S., 283, 289.)

3. The enforcement of the constitutional limitations on the legislative powers of Congress or the

states, resolves itself always into a practical matter. It is quite impossible, by precise legal formula, to limit the extent of the police power of the states as opposed to the limitation of the Fourteenth Amendment; or to define the limitations on the power of Congress prescribed by the Due Process Clause; or to separate the proper functions of state and nation. After all is said and done, there remains the question of practical effect, and there must be a point, the location of which depends to some extent on the qualities and characteristics of statesmanship of the members of the Court, where the Court must say "Thus far and no farther."

4. The maxim of our law, first enunciated by Marshall, that the power to tax is the power to destroy, is not an admonition to the Courts to assume that every tax law passed by the sovereign power is valid; but it is an admonition to scrutinize carefully whether the power exists, because of the realization that, if it exists, it may be used to the extent of destruction.

> "The power to destroy which may be the consequence of taxation, is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope." (*Knowlton vs. Moore,* 178 U. S., 41, 60).

This admonition ought to be effective, not only when consideration is given to possible confisca-

tory rates of taxation, but when consideration is given to the objects to be accomplished by the taxing power. The purpose and effect of this statute, beyond peradventure of doubt, are simply and solely to regulate matters entrusted to local authorities. If it is sustained, it is quite impossible to conceive how any statute labeled a taxing statute, passed by Congress to regulate business activities or even personal conduct, may ever be held unconstitutional. It is argued that this Court has concluded this case by some of its earlier decisions; but the distinction between this case and *McCray vs. United States* is far and away greater than any distinction that could be drawn between a decision of this Court confirming the validity of this statute and a case which involved a minimum wage statute, or an employees' pension statute, or a labor union or anti-labor union statute, or any of the countless other conceivable federal statutes which, being enacted, one by one, would transfer to the national authority the whole regulation of business and personal life.

5. It is true that this statute, if valid, leaves to the State of North Carolina the right to make a more drastic child labor law; and its existing child labor law is, as heretofore pointed out (page 16), in some respects more drastic and effective. The respective states in these internal matters, though, must, under the Constitution, and if our theory of a federated government is to be sustained, be free to *permit* its citizens to adopt a given course of conduct, as well as free to *forbid* its citizens to

adopt a certain course of conduct; and the citizen of the state must be free, as to these matters, to pay allegiance to, and obey the will of, *one* sovereign, the state, and not *two* sovereigns. This is by no means saying, as the liquor dealer attempted to argue in the *License Cases* (*supra*), that this right of the citizen, and right of the state, may not be incidentaly affected in order that the federal government may have requisite revenue. It is true, too, under the Eighteenth Amendment to the Constitution, that in matters connected with the liquor traffic, the citizen is subject to two sovereigns, the state and the nation. But in the relations that are here involved, and as against a statute as frankly regulatory as this is, the states have reserved to them in the Constitution the power to permit as well as to forbid, and the citizen the right to a proper and single control.

6. Even this Court may not declare a congressional enactment void because it is in the judgment of members of the Court unwise; there must be "juridical *un*constitutionality" and not simply "political *anti*-constitutionality," to warrant the Court holding a statute passed by Congress unconstitutional and void. This does not mean, though, that this Court must demonstrate the constitutionality or unconstitutionality of a statute by the application of a legalistic formula or distinction, such as might be very useful in disposing of the ordinary legal question. It does not mean, either, that this Court is to shut its eyes to every tendency of the times, or to every consideration of the effect on our institutions of the decision that it is called

upon to make. The decisions of this Court announced by John Marshall stopped the tendency toward magnification of the individual states, and if that tendency had not been stopped the nation would have been impotent. The present tendency is in the other direction, and the federal government is overloaded, while the states are being left to function hardly at all. In a thoughtful article recently called to our attention (we have lost the name of the author), tribute was paid to the principle of local self government in the following words:

> "The reverse of that principle is the danger signal flashed by history. Particularly in this country of great territorial extent, of urban concentration and rural paucity of population, of diversity of climate, natural conditions, resources, habits, occupations, economic circumstances and social interests, the perils of centralization in respect of affairs purely local in their nature and not those specifically and wisely delegated in the Constitution, are apparent from the lessons of the past. It is to the principle of local self-government that our country—if it is to remain one country—must look for political salvation, or look in vain."

In 1915, Senator Elihu Root, in his Princeton Lectures on the Constitution, gave significant expression to the same thought:

> "On the other hand, if the power of the nation would override that of the states and

> usurp their functions, we should have this vast country, with its great population, inhabiting widely separated regions, differing in climate, in production, in industrial and social interests and ideas, governed in all its local affairs by one all-powerful central government at Washington, imposing upon the home life and behavior of each community the opinions and ideas of propriety of distant majorities. * * *. Preservation of our dual system of government, carefully restrained in each of its parts, by the limitations of the Constitution, has made possible our growth in local self-government and national power in the past, and, so far as we can see, it is essential to the continuance of that government in the future."

7. The question before this Court in this case, then, is, whether a resort to the Commerce Clause of the Constitution having failed, Congress may, by a resort to the Tax Clause of the same instrument, control the entire police power of the states, and so open the door to the complete nationalization of our government, so ardently desired by some of the publicists of our day.

This is an interesting and important case, because upon its result depends the question whether the *Dagenhart Case*, and its decision, was a real, or merely a temporary and *pro forma*, assurance of the continuance unimpared of state authority over "matters purely local."

POINT VII.

The judgment of the District Court is right and should be affirmed.

JNO. N. WILSON,
CLEMENT MANLY,
WM. M. HENDREN,
WM. P. BYNUM,
JUNIUS PARKER,
Counsel for Defendant-in-Error.
(1668)